



## ***TESIS DOCTORAL***

# ***Composite Administrative Procedures in the European Union***

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<b>List of abbreviations</b>
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AG	Advocate General
CAP	Common Agricultural Policy
CFI	Court of First Instance
ChFR	Charter of Fundamental Rights of the European Union
CITES	Convention on International Trade in Endangered Species
CoJ	Court of Justice
CPMP	Committee for Medicinal Products for Human Use
EAFRD	European Agricultural Fund for Rural Development
EAGF	European Agricultural Guarantee Fund
EC	European Community
ECHA	European Chemicals Agency
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EFSA	European Food Safety Authority
EMA	European Medicines Agency
ERDF	European Regional Development Fund
ESF	European Social Fund
EU	European Union
EURATOM	European Atomic Energy Community
GC	General Court
GMO	Genetically Modified Organism
OLAF	European Anti-Fraud Office
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
ReNEUAL	Research Network on European Union Administrative Law
TEC	Treaty on the European Community
TECSL	Treaty on the European Steel and Coal Community
TEEC	Treaty on the European Economic Community

TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
US	United States
WTO	World Trade Organisation

## **CHAPTER 1**

### **Introduction**

- 1.1.- Objective
- 1.2.- Structure
- 1.3.- Methodology
- 1.4.- Acknowledgements

### ***1.1.- Objective***

The fashion in which the European Union pursues its objectives has varied enormously over time. In all fronts but, in particular, as a public administration that implements the policies of the Union. Currently, the European Union's executive action is not as it was originally designed to be. The model of executive federalism, where the Union takes decisions in the fields where it is competent and Member States implement them, was valid for the old Communities and still perceivable in the Treaties and in the rulings of the Court of Justice. Today it is often more of a legal fiction than a reality.

The reality is more complex, more pragmatic and yet more functional and ambitious than the old paradigms assume. Political science has aimed at describing and assessing the new trends regarding the EU and European integration with new theories and innovative ideas. Legal doctrine should also forsake the orthodox approaches of the past and analyse the dynamic reality as it actually is. If the categories of the past are not apt to describe the new situation, academic work should be started in the development of new relevant categories.

There is an interplay of national and Union actors in many, if not most, of the fields where the Union plays a role. If the Union can be described as federal, it certainly is a very peculiar federal structure. European public administration is an integrated administration characterised by an intense cooperation between the national and the EU administrative levels in every phase of the policy circles. At the same time that the old distinction between direct and indirect administration vanishes, there appear other forces shaping the current scenario; the expansion of the areas covered by the EU administrative action and decentralization of functions through agencies and other bodies, which simultaneously become nodes of networks inclusive of the national stakeholders. Legal analysis cannot afford to remain insensible to this dynamism. The intention of this work is to be an academic contribution to the description of this reality.

This phenomenon of intense cooperation in the European Union is reflected in many fields of study and can be perceived and analysed from different perspectives. It is noteworthy that the logic of cooperation has become preponderant in many areas of the EU's policy-making, but this has not been reflected in the judicial architecture of the Union. For a jurist, particularly with a focus on administrative law, the most remarkable element of this phenomenon is that of 'composite procedures'.

Composite procedures are the procedural display of this intense cooperation between the Union and the Member States. They are heterogeneous and lack a general legal framework. However positive they are for building networks of mutual trust between the national and Union's public administration, and however efficient for the adoption of technically complete and consensual decisions, they raise many concerns from a legal point of view. There is not much value in making further terminological precision at this early point. One of the merits of this work is to provide consistent definitions for a concept that is neither straightforward nor settled. Suffice it to say at this moment that, in composite procedures, the logic of intense cooperation between the public administration of the Union and its national counterparts reaches its zenith and becomes proceduralised.

It is not worth searching for a definition to this concept in the case-law or the legislation. Many of the shortcomings of composite procedures stem precisely from this situation of lack of determination. The legislator creates composite procedures at a speedy pace without a consequent change in the general legal categories. Primary law is based on assumptions that do not hold true for composite procedures, and judges have these categories in mind when adjudicating disputes related to these composite procedures. No wonder, the solutions they offer lack coherence, are not satisfactory in terms of respect for individual rights, and judges find themselves blocked in legal dead-ends.

Given the importance of composite procedures in the Administrative Law of the Union it is perhaps striking that the scholarly attention that the phenomenon of composite procedures has received until now is relatively low, and the solutions that have been offered

are not complete. Ultimately, composite procedures are not a legal category in the mind of the Union's judges and the Union's legislators yet, and there comes the objective of this dissertation.

The aim of this work is to make a relevant categorisation of composite procedures, identify and describe the problems and legal concerns they bring about, and to propose concrete solutions to the challenges they trigger.

The intellectual challenge is demanding, yet extremely stimulating. The analysis and understanding of a multilevel structure of administrative decision-making is in itself a thought-provoking exercise for a legal researcher, but the discovery of gaps in the protection of individual rights in this complex structure, so as to advance solutions, has truly been a thrilling task.

Procedural rights were conceived in the logic of a citizen *vis-à-vis* one public authority. In composite procedures, several authorities intervene, which distorts the traditional scheme and might lead to shortcomings to the detriment of the individual. Likewise, the right of judicial review, which is consubstantial to the notion of rule of law, can be endangered in situations where private parties may be denied the right to challenge acts emanating from composite procedures. The Court of Justice puts a big nominal emphasis in the protection of rule of law, but it arguably fails to make a complete assessment of these procedures. This is in part because it lacks the means of cooperating closely with national courts, and in part because it keeps its strict line of interpretation of the provisions giving access to justice. This results in several gaps in judicial protection, some of them entailing relevant breaches of the right of judicial review. The analysis of these lacunae occupies the central part of this dissertation.

In the context of composite procedures, questions like what is the competent jurisdiction, what acts are reviewable and who has legal standing still remain unsolved. In the



final part of the work, some proposals to overcome these gaps will be presented. A new mechanism for cooperation between the national and the European courts would bridge many of the gaps and would help to overcome the current asymmetry between the intense cooperation at the administrative level and the lack thereof in the judicial system. A codification of administrative procedural rules would also contribute to the clarification of the mentioned questions.

## ***1.2.- Structure***

A rigorous analysis of composite procedures entails a prior discussion about administrative procedures in the European Union, and this, in turn, requires a deliberation on whether or not there is a European Union's public administration that can act through administrative procedures. These previous analyses constitute the first two chapters of the dissertation, and not for purely esthetical reasons. The conclusions of what kind of public administration the EU administration is and what kind of administrative procedures serve its action are relevant and will be reflected in the other parts of this work.

In the context of national law, the concepts of public administration and administrative procedures can perhaps be taken for granted. In the context of the European Union, it would be an intellectual mistake to do so. Putting a question mark on the existence of a real European Union's public administration and, subsequently, testing whether the adjective 'administrative' is really appropriate for the procedures it follows is not only a necessary scholarly *apriori* for the meticulous study of a peculiar type of administrative procedure of the Union's public administration. It is the necessary preamble where the particular characteristics of the Union will appear evident and will bear relevance for the central part of this work. Even though it will be concluded that yes there is a Union's public administration and yes there are administrative procedures in the European Union, it shall be explained why and what their specific characteristics are.

The structure of the dissertation follows this logic. The second chapter is devoted to the Union's public administration. The expression itself appears almost self-contradictory. The idea of public administration - certainly more alien to the common law tradition and thus less elegant in the English language - is linked to the modern constitutional State in which a separation of powers is established. Thus, it would be negligent to assume that this applies to the European Union directly, without further elaboration. It is perhaps for this reason that only a limited number of scholars have used the expression, and some have taken it for granted without much reflection. Doubts to the existence of a European Union public administration are legitimate.

The situation has dramatically changed with the entry into force of the Lisbon Treaty, because Primary Law now says that there is a European administration, and that it is open, efficient and independent. But then, what is this 'European administration'? Does it refer to the executive machinery of the Union, *i. e.* the Commission and the agencies only? Or does it, as a functional approach to the European administration, include national public administration when implementing EU policies too? Does it correspond to the EU's public administration that we are looking for? These questions indeed point to the core of the discussion that will be elaborated in a later part of the dissertation. The question on the existence of a Union's administration and its characteristics is, thus, far from superfluous.

Even though the conceptions of public administration are different in the several Member States and, what is more, they are changing rapidly, one can say that the Union's public administration is a peculiar one, different from all other national public administrations. The main feature of EU's public administration *vis-à-vis* its national counterparts is precisely its degree of interdependence with the national administrations, its reliance on external agents and its openness to outside stakeholders. Conceived as a small apparatus which relied on national administration to implement its policies, the European administration has evolved to a multilevel administration in which each level frequently interacts with the others to carry out its duties. This evolution again is intimately linked to the central part of this thesis.

Cooperation has been inherent to the European integration since its early beginnings. Yet, in its conception, cooperation was a clearly structured, where the central authority would decide and the decentralised bodies would implement. An elegant paradigm, relatively easy to handle for lawyers, but one which fades away with the emergence of composite procedures, where cooperation is intense, blurred, and multidirectional. Cooperation does not only reflect the practical need found in the light administration of the old communities, so much dependent on the national administrations, but also a source of legitimacy for the Union, as the enlargement of its competences is more readily accepted by Member States as long as they are given a significant role in the process of policy design and implementation.

So, taking the existence of a Union's administration as a departing point, its peculiar characteristics would be highlighted. The element of 'mixicity', which has increased over time, is doubtlessly the element with the greatest impact in the subsequent parts of the research. The logic of cooperation permeates all aspects of the Union's administration, and certainly the administrative procedures through which it operates.

Administrative procedures are conceived as the fashion through which public administration carries out its duties. Can this concept be transposed directly to the procedures carried out at the level of the Union without further elaboration? Chapter three aims at replying this question. Considering that the conception of administrative procedures differs in the different Member States and that they have evolved significantly over time, it is difficult to reply with a simple affirmative answer.

Taking this historical evolution as an example, it is worth noting that the emphasis on the conception that individual rights are affected, not only by the decision of the administrative authority, but also along the procedure for this decision-making, is relatively recent. Yet protection of procedural rights has gained relevance, and it is frequently posited as a justification of the powers of the public administration. Public authorities can

legitimately take decisions, to the detriment of the citizens if necessary, as long as the decisions have been taken after the administrative procedure and in respect of the relevant principles and guarantees.

This individual rights-oriented understanding of the administrative procedure, which was probably not prevalent in some Member States only some decades ago, has been emphasised by the Court of Justice of the European Union and has large implications for our analysis. Without fully respecting the rights of the individuals throughout the procedure, there is no valid decision. Without a sufficient access to a competent court that can review the decision, there is a serious breach of fundamental rights. These statements, which reflect the current understanding of administrative procedures, are not self-evident in the context of composite procedures.

Furthermore, the present time is particularly interesting, as the debate on codification of administrative procedures in the European Union has gained traction, both in the academic circles and in the institutional agenda of the EU. That is perhaps an opportunity for the solutions that will be advocated at a later stage.

The fourth Chapter starts with the difficult task of providing a comprehensive, legally sound, yet simple definition of composite procedures and a justification of the use of those terms. The difficulty of this exercise resides in the lack of legislative and judicial references. After the definition, a classification within composite procedures will be laid down. This classification is important because some of the shortcomings of composite procedures affect the different types of composite procedures differently.

The largest part of this chapter is devoted to the analysis of the existing European legislation setting up these composite procedures. This exercise is also difficult because composite procedures are created without any reference to this category and, while in some cases the procedures indubitably fall within the definition given, some other fall rather into a

grey area. Composite procedures are more and more numerous, particularly in the field of authorisation of particular products within the internal market. The rationale behind it is that Member States are more willing to allow for the central powers of the Union taking decision on such authorisation when they share this power through a composite procedure. However, some other areas of EU action, like the space of freedom, security and justice, are also relevant for recently established composite procedures. This analysis puts the observation of the phenomenon of composite procedures into a concrete practical perspective and hints already to some of the legal concerns of the following chapter.

Composite procedures have recently gained scholarly attention. However, in most cases the academic approach has been fragmentary, stressing particular shortcomings or particular types of composite procedures. One of the goals of this research is the search of a global perspective on composite procedures, the challenges they bring about and the solutions that can be put forward. This is not the same as exhaustiveness. The number of composite procedures is hard to determine because more and more are being created, and many of them have peculiar characteristics that might lead to specific problems that are difficult to foresee before a concrete situation is presented. In this vein, the most relevant examples of composite procedures will be presented.

These nine examples of composite procedures range from very wide areas of EU action like agricultural policy, to very specific examples like ecolabels; from old composite procedures that have varied much over time, like the management of European funds, to very recent examples like the procedure for authorisation of biocides; and from examples where the features of composite procedures are easily identifiable and serve as useful patterns for our analysis, like the procedure regarding pesticides, to those where the features of composite procedures are blurred, like it is the case of procedures in the area of freedom security and justice. The description of the specific procedures enacted in secondary legislation will be essential for the identification of the shortcomings they entail.

The fifth chapter of the dissertation is the longest and most important. The rights of the individual in his relation *vis-à-vis* the public administration are fundamentally distorted when there is more than one public authority intervening, each one subject to a different legal framework. These distortions can be perceived at three different moments of time. Firstly, during the administrative procedure itself, as the question of 'before whom' does the individual exercise his procedural rights can be a source of concern. Secondly, at the moment the administrative decision is taken, as it covers the activities of several public authorities, all of which conform the procedural *iter*, and thus the reasons, of the final act. Thirdly, at the moment when the administrative decision is brought before the judges, as the question of what judge is competent for which decision, or which part of it, would appear highly complex.

Hence, three aspects are identified as the most relevant challenges that composite procedures bring about. The first, during the administrative procedure itself, is the procedural guarantee of a hearing before the final administrative decision is taken. The second relates to the administrative decision itself, as the administration has the duty to state all the reasons for it. The third, most important, is the right to a judicial review. The conception and scope of those rights will be analysed together with the case law of the Union's courts when confronted with the specific cases brought before them in the context of composite procedures.

This chapter focuses thus on a critical analysis of the existing case law, identifying the merits and the shortcomings of the rulings until now. The criticism in this analysis is directed more often to the inability of the Courts to tackle the shortcomings of composite procedures given the lack of mechanisms to do so than to the contents of the rulings *per se*. That is why the solutions proposed later are not primarily related to a change in the approach of the judges of the Union in itself but rather to a change in the legal framework, which will bring about a consequential change in the judicial perception of composite procedures and thus in the existing case law. Even where one could be critical of the outcome reached by the Union's courts, in most of these cases, it is hardly imaginable how they could have reached a different conclusion given the existing legislative framework.

The sixth chapter includes the proposals to overcome the shortcomings identified in the fifth chapter. The primary objective of the proposals put forward in this chapter is that they are comprehensive -meaning that they leave none of the gaps described uncovered- and they are effective in tackling the problems identified. Although the assessment of the political opportunity of the proposals of this work cannot be our primary concern, these considerations are also taken on board.

In this vein, the codification of composite procedures is not a mere idea discussed in the academic circles of administrative lawyers. The proposal which is yet to be taken by the European Commission but, formally, it is on the institutional agenda. This provides the perfect opportunity for a regulation which describes and regulates composite procedures. The legal technicalities of this proposal, such as the legal basis for it, or the wording of some of the provisions which would resolve the problems identified, will be described in this chapter.

The proposal is thus to include composite procedures in the general codification of administrative procedures. Yet as ambitious as this proposal is, it would not suffice to tackle all of the shortcomings identified. Since the competence of the EU courts cannot possibly cover the whole of the procedural *iter* ending in an EU decision when the national administrative authorities have taken part in it, a mechanism of cooperation between European and national courts will be proposed. This mechanism should mirror *mutatis mutandis* the preliminary ruling procedure but in an inverse direction. The technicalities to be put in place, in terms of reform of secondary legislation, will also be explained.

Finally, in terms of structure, it should be noted that each chapter starts with some preliminary remarks on its relevance and the internal structure of the chapter, while linking it to the outcome of the previous chapter. Likewise, each chapter ends with some conclusions, even if provisional. Even with the risk of reiterating some of the ideas of the conclusions at the end of this work, the structure of each of the chapters facilitates the identification of the

outcome of the assessment carried out for each of them as well as the consecutive development of each of the chapter on the foundations of the result of the previous one.

### ***1.3.- Methodology***

The questions that this doctoral dissertation aims at answering have not, to my understanding, been fully replied so far. These questions are 'What are composite procedures?', 'What are the problems they entail?' and 'What solutions can be proposed for them?'. We will explore that the topic of composite procedures in the European Union has gained academic attention and there is an increasing number of publications on the issue. However, the approach is mostly fragmentary. Several articles have been published on a particular problem identified in composite procedures, or on a particular case decided by the Court of Justice, or on the occasion of codification and the possibilities it offers for composite procedures. This study intends to provide a general view, in the types of composite procedures it covers, in the different problems they bring about and in the solutions proposed. The systematic perspective intends to be one of the qualities of this research.

In the never-ending process of accumulating knowledge, this work intends to single out the important aspects that are legally problematic and try to find solutions from a general wide-ranging point of view. We will see how this lack of a general perspective is indeed at the origin of many of the difficulties in the context of composite procedures. The methodology of the dissertation is clearly reflected in its structure, with a significant variation for each of its parts.

The second and third chapters rely heavily on academic literature, primarily of legal scholars, but not exclusively. Works belonging to the field of political science are also incorporated. Many of the pages of these first parts have a descriptive character of the current state-of-affairs, though with the intention of drawing relevant conclusions for the subsequent analysis. Thus, the first two chapters are needed as a prerequisite of the study of composite procedures. They involve an ample literature review in which the main aim has been to



synthetize effectively and uncover the way forward to the further research which is arguably much needed in the field of composite procedures. In that there was the risk, common among literature reviews, for producing lists of citations and findings that resemble a 'phone book without much plot'<sup>1</sup>.

The intention of these two chapters has been to prove that there is an EU public administration and that it is able to act according to administrative procedures. It would be a mistake to take these elements for granted. Simultaneously, as evidence is provided that these elements exist, the focus is on the peculiar traits of both the EU administration and its administrative procedures. These traits relate to logic of intense cooperation for which one of the main manifestations is precisely the phenomenon of composite procedures. In so doing, it has been the intention of the assessment to carry out a successful literature review which, in the words of Webster and Watson, is one that:

"creates a firm foundation for advancing knowledge. It facilitates theory development, closes areas where a plethora of research exists, and uncovers areas where research is needed"<sup>2</sup>.

The fourth chapter entails a detailed assessment on the existing legislations which establishes the different examples of composite procedures. In this part the task is to go, inductively, from the concrete example found in secondary legislation to relevant schemes that the researcher needs for systematization and, once this is done, the general category can be used to identify the problems of composite procedures. An additional step to simplify the understanding of the reader has been to draw charts where the procedure can be understood in a glimpse.

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<sup>1</sup> Andrew Booth, Diana Papaioannou, and Anthea Sutton, *Systematic Approaches to a Successful Literature Review* SAGE Publications (New York, 2012), at 3.

<sup>2</sup> Jane Webster, and Richard Watson, "Analyzing the past to prepare for the future: Writing a literature review", 26(2) *MIS Quarterly*, 26, 2, 13-23, at 13.

The fifth chapter focuses primarily on the case-law of the Court of Justice. It contains predominantly an analysis of the judicial approach to the different challenges of composite procedures, acknowledging its merits and highlighting its possible shortcomings. This analysis of the case law is difficult because the courts have never referred to composite procedures, but have tackled the different controversies of the different composite procedures differently. The task of researching and singling out the relevant cases has, thus, been large. Furthermore, given the lack of a common category, the sensibilities of the judges in the diverse areas of law have also been divergent, thus complicating the analysis. Academic sources, in analysing the case law and in the preliminary description of each of the three points of focus, are also an important part of this chapter.

The sixth chapter is the one that relies less on external sources, both academic articles and case law, and more on all the result of the work of the previous chapters. In this last chapter, the thesis navigates in relatively unexplored waters, and requires certain insights in the legislative field and in the political realities of the EU institutional processes. As it tackles the challenge of creating a new legal framework, which should be fully satisfactory, it is the most forward-looking.

#### ***1.4.- Acknowledgements***

The idea of devoting a doctoral research to the complex phenomenon of composite procedures stemmed from a lecture in Luxembourg from professor Herwig Hofmann. I had the inspiration that from the difficult notion of composite procedure an analysis of many aspects of the current state of affairs on European administrative law was possible. I thank him for this initial source of inspiration and for his ideas on reaction to my initial interest back then.

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*(translation into Spanish of Chapter 1)*

## **CAPÍTULO 1**

### **Introducción**

- 1.1.- Propósito
- 1.2.- Estructura
- 1.3.- Metodología
- 1.4.- Agradecimientos

### ***1.1.- Propósito***

La forma en la que la Unión Europea ha llevado a cabo sus objetivos ha variado enormemente en el tiempo. Esta afirmación, que es aplicable a todos los ámbitos, es particularmente importante en relación a la ejecución de las políticas de la Unión. Actualmente, la acción ejecutiva de la Unión Europea no tiene lugar de la forma en la que originalmente fue diseñada. El modelo del llamado "federalismo ejecutivo", según el cual la Unión toma las decisiones en los ámbitos de sus competencias y los Estados miembros las ejecutan, fue válido en las antiguas Comunidades Europeas y todavía puede percibirse en los Tratados y en la jurisprudencia del Tribunal de Justicia. Hoy en día, este modelo es más una ficción que una realidad.

La realidad es más compleja, más pragmática pero también más funcional y ambiciosa de lo que resulta de los antiguos paradigmas. Los politólogos han procurado describir y analizar las nuevas tendencias relativas a la UE y a la integración europea con nuevas teorías e ideas innovadoras. La doctrina jurídica debería también abandonar los enfoques ortodoxos del pasado y analizar la realidad tal y como es. Si las categorías del pasado no son aptas para describir la nueva situación, la investigación académica debería comenzar a desarrollar nuevas categorías que resulten relevantes.

Existe una interacción entre los actores de la Unión y los actores nacionales en muchos, si no la mayoría, de los ámbitos en los que la Unión tiene competencias. Si la Unión puede ser definida como federal, es sin duda una estructura federal *sui generis*. La Administración Pública europea es una Administración Pública "integrada" y caracterizada por una cooperación intensa entre los niveles administrativos nacionales y europeos en todas y cada una de las fases del *iter* de las políticas de la Unión. Al mismo tiempo que la vieja distinción entre la administración directa e indirecta se desvanece, aparecen otras fuerzas que modelan el escenario actual: la expansión de las áreas bajo la influencia de la acción administrativa de la Unión y la descentralización de funciones a través de las agencias y otros

órganos que se tornan, simultáneamente, en nódulos de redes que incluyen a las agencias descentralizadas nacionales. El análisis jurídico no puede permitirse permanecer al margen de este dinamismo. El objetivo de este trabajo es lograr una contribución académica a la descripción de esta realidad.

Este fenómeno de la cooperación intensa en la Unión Europea se refleja en muchos ámbitos de estudio y puede percibirse y analizarse desde distintas perspectivas. Merece la pena resaltar que la lógica de la cooperación se ha vuelto preponderante en muchas áreas de la formulación de políticas, pero ello no se ha reflejado para nada en la arquitectural judicial de la Unión. Para un jurista, en particular con especialización en Derecho Administrativo, el elemento más destacado de este fenómeno de cooperación son los procedimientos compuestos.

Los procedimientos compuestos son la traducción procesal de esta cooperación intensa entre la Unión y los Estados miembros. Los procedimientos compuestos son heterogéneos y carecen de un marco jurídico general. Aunque sean positivos para la construcción de redes de confianza mutua entre las Administraciones de la Unión y de los Estados miembros, y aunque sean eficientes para la adopción de decisiones técnicamente completas y consensuadas, los procedimientos compuestos traen consigo muchas cuestiones complejas desde un punto de vista jurídico. No es pertinente en este punto inicial hacer mayores precisiones terminológicas, pero uno de los méritos de esta tesis es el de aportar definiciones coherentes para este concepto que no es ni unívoco ni aceptado de forma unánime. Baste en este momento indicar que en relación a los procedimientos compuestos la lógica de la cooperación intensa entre las Administraciones Públicas nacionales y de la Unión alcanza su apogeo desde un punto de vista procesal.

No tiene utilidad buscar una definición del concepto de procedimientos compuestos en la jurisprudencia o en la legislación. Muchas de las deficiencias de los procedimientos compuestos tienen su origen precisamente en esta situación de falta de determinación clara. El legislador crea estos procedimientos compuestos a un ritmo acelerado sin una

modificación consecuente en las categorías jurídicas generales. El Derecho originario se basa en suposiciones que no son ciertas en relación a los procedimientos compuestos, y el juzgador tiene las viejas categorías en mente cuando decide sobre las controversias relativas a los procedimientos compuestos. Sin duda, las soluciones que ofrecen los jueces de la Unión carecen de coherencia y no resultan satisfactorias en términos de respeto para los derechos subjetivos, de forma que los tribunales se encuentran bloqueados en "callejones sin salida".

Dada la importancia de los procedimientos compuestos en el Derecho Administrativo europeo, es quizá sorprendente que la atención doctrinal que se ha dado a este fenómeno haya sido escasa hasta ahora, y que las soluciones que se han ofrecido sean incompletas. En definitiva, los procedimientos compuestos no son todavía una categoría jurídica en la mente del juez o del legislador de la Unión. Hacer de ellos una categoría coherente es el objetivo de esta tesis.

El propósito de este trabajo es por tanto hacer una categorización apropiada de los procedimientos compuestos, identificar y describir las cuestiones jurídicas problemáticas que plantean, y proponer soluciones concretas para los retos que traen consigo.

El desafío intelectual es exigente, si bien muy estimulante. El análisis y la comprensión de la estructura multinivel del proceso decisonal es en sí mismo un ejercicio que invita a la reflexión del investigador jurídico, y el descubrimiento de las lagunas en la protección de los derecho subjetivos en esta estructura compleja, de modo que se puedan avanzar soluciones para ellas, ha sido una tarea francamente apasionante.

Los derechos procesales fueron concebidos en esquema lógico de un ciudadano frente a una autoridad pública. En los procedimientos compuestos, varias autoridades públicas intervienen lo cual distorsiona el esquema tradicional y puede en ocasiones llevar a deficiencias en perjuicio del particular. De forma similar, el derecho a la tutela judicial, consustancial al principio del Estado de Derecho, puede ponerse en riesgo en situaciones en



las que a los particulares se les niega el derecho a impugnar actos que emanan de dichos procedimientos compuestos. El Tribunal de Justicia pone un gran énfasis, en términos nominales, en la protección del principio del Estado de Derecho en la Unión, pero yerra al no conseguir un análisis completo de estos procedimientos. Ello se debe en gran parte a que carece de los mecanismos de cooperación estrecha con los jueces nacionales, pero también en parte por mantener una interpretación estricta de las normas de acceso a su jurisdicción. Ello lleva a varias lagunas en la protección jurisdiccional, algunas de las cuales traen consigo importantes violaciones del derecho a la tutela judicial efectiva. El análisis de estas lagunas ocupa la parte central de la tesis.

En relación con los procedimientos compuestos, cuestiones tales como cuál es la jurisdicción competente, qué actos son recurribles y quién tiene legitimación para recurrir aún permanecen sin respuesta clara. En la parte final de este trabajo, se presentarán algunas propuestas para solucionar estas cuestiones. Un nuevo mecanismo de cooperación entre los tribunales nacionales y los de la Unión evitaría muchas de las lagunas identificadas, y contribuiría a superar la actual asimetría entre la cooperación intensa que existe a nivel administrativo con la ausencia de la misma entre los sistemas judiciales. La codificación de los procedimientos administrativos también contribuiría a clarificar muchas de las cuestiones planteadas.

## ***1.2.- Estructura***

Un análisis riguroso de los procedimientos compuestos lleva consigo la previa discusión sobre los procedimientos administrativos en la Unión Europea, lo que a su vez requiere de una deliberación sobre si existe una Administración Pública de la Unión Europea que pueda actuar por medio de dichos procedimientos administrativos. Los análisis previos constituyen los dos primeros capítulos de la tesis, y ello no sólo por razones puramente estéticas. Las conclusiones sobre qué tipo de Administración Pública es la Administración de la Unión y qué tipo de procedimientos administrativos utiliza son relevantes y serán utilizadas en las partes subsiguientes de la tesis.

En el marco del Derecho interno, los conceptos de Administración Pública y procedimiento administrativo pueden quizá darse por sentados. En el ámbito de la Unión Europea, sería un error conceptual hacerlo. Poner un signo de interrogación sobre la existencia de una verdadera Administración Pública de la Unión Europea y, consecuentemente, comprobar que el adjetivo "administrativo" sea realmente adecuado para los procedimientos de que se sirve no es solo un apriorismo académico necesario para el estudio meticuloso de un tipo peculiar de procedimientos de la Administración Pública de la Unión. Es, de hecho, el preámbulo necesario en el que se plasmarán las características especiales de la Administración Pública de la Unión y que resultará de importancia en la parte central de la tesis. Incluso aunque se concluirá que sí existe una Administración Pública de la Unión y que sí existen procedimientos administrativos para la Unión, deberá explicarse por qué y cuáles son sus características específicas.

La estructura de la tesis sigue la siguiente lógica. El segundo capítulo está dedicado a la Administración Pública de la Unión. La expresión parece a primera vista casi contradictoria en sí misma. La idea de una Administración Pública -ciertamente un término ajeno a la tradición del *common law* y por ello menos elegante en lengua inglesa - se vincula indisolublemente al Estado moderno constitucional de la separación de poderes. Así pues, sería negligente dar por hecho que el término es aplicable directamente a la Unión Europea, sin mayor elaboración. Es quizá por ello que un número limitado de autores utiliza la expresión, y alguno de ellos la ha dado por sentado sin una reflexión pausada. Las dudas respecto a la existencia de una Administración Pública de la Unión son por ello legítimas.

La situación ha cambiado drásticamente desde la entrada en vigor del Tratado de Lisboa, dado que el Derecho originario habla ya de una "administración europea" y dice de ella que es abierta, eficaz e independiente. Pero, ¿qué es entonces esta "administración europea"? ¿Se refiere sólo a la maquinaria ejecutiva de la Unión, esto es, a la Comisión y a las agencias? ¿O incluye también, en una aproximación funcional, a las Administraciones Públicas nacionales en tanto en cuanto implementan las políticas de la Unión? La cuestión de

la existencia de la Administración Pública de la Unión y de sus características aparece así lejos de ser superflua.

Si bien las concepciones sobre la Administración Pública son diversas en los distintos Estados miembros y, lo que es más, han cambiado a gran velocidad, puede decirse que la Administración Pública de la Unión es distinta respecto a todas ellas. El rasgo principal de la Administración Pública de la Unión Europea frente a sus homólogas nacionales es precisamente su grado de interdependencia con las Administraciones nacionales, su vinculación a agentes externos y su apertura a otras partes interesadas. Concebida inicialmente como un pequeño órgano con dependencia de las administraciones nacionales para implementar sus políticas, la Administración Pública europea ha evolucionado a una Administración multinivel en la que cada nivel interactúa con frecuencia con otros para llevar a cabo sus tareas.

La cooperación ha sido inherente a la integración europea desde sus inicios. Aun así, en su concepción, la cooperación estaba claramente estructurada, de forma que la autoridad central tomaba las decisiones y los órganos descentralizados las llevarían a cabo. Un paradigma elegante, relativamente fácil de gestionar para los juristas, pero que sin embargo se desvanece ante la emergencia de los procedimientos compuestos, en los que la cooperación es intensa, difusa y multidireccional. La cooperación no sólo se refleja en la necesidad práctica que se encuentra en la liviana administración de las antiguas Comunidades Europeas, tan dependiente de las Administraciones Públicas nacionales, sino también en constituir una fuente de legitimidad para la Unión, de forma que la ampliación de sus competencias es aceptada con más facilidad por los Estados miembros en tanto en cuanto se les dé a ellos también un papel significativo en el proceso de diseño de políticas y en su implementación.

De esta forma, partiendo de la existencia de la Administración Pública de la Unión, se analizarán sus características. El elemento de la 'mixticidad', que se ha incrementado con el tiempo, es sin duda aquel que tiene mayor impacto en las partes subsiguientes de la

investigación. La lógica de la cooperación permea a todos los aspectos de la Administración Pública de la Unión, y evidentemente a los procedimientos a través de los que actúa.

Los procedimientos administrativos son concebidos como la forma mediante la cual la Administración lleva a cabo sus funciones. ¿Puede este concepto ser transpuesto directamente a los procedimientos empleados a nivel de la Unión sin mayor elaboración? El capítulo tercero tiene por objetivo dar respuesta a esta pregunta. Teniendo en cuenta que la concepción de los procedimientos administrativos es distinta en los diferentes Estados miembros, y que ha evolucionado notablemente a través del tiempo, sería difícil dar una respuesta simplemente afirmativa.

Tomando como ejemplo esta evolución histórica, merece la pena destacar que el énfasis en la concepción según la cual los derechos subjetivos resultan afectados no sólo por el acto que pone fin al procedimiento administrativo, sino también a lo largo de todo el procedimiento administrativo, es relativamente reciente. Hoy la protección de los derechos procesales ha ganado mucho peso, y estas garantías constituyen a menudo la justificación de los poderes de la Administración Pública. Las autoridades públicas pueden en efecto tomar una decisión, en detrimento de los particulares si es necesario, en tanto en cuanto la decisión haya sido tomada tras el preceptivo procedimiento administrativo y en respeto de los principios y garantías aplicables.

La aproximación al procedimiento basada en los derechos subjetivos de los particulares, que quizá no era prevalente en algunos Estados miembros hace apenas unas décadas, ha sido adoptada por el Tribunal de Justicia de la Unión Europea y ello tiene importantes consecuencias para nuestro análisis. Sin un respeto pleno a los derechos de los particulares a lo largo del procedimiento administrativo, no puede haber una decisión válida en Derecho. Estas afirmaciones, que reflejan la actual concepción del procedimiento administrativo, no parecen tan evidentes en relación con los procedimientos compuestos.

Además, el momento actual resulta particularmente interesante, dado que el debate sobre la codificación del procedimiento administrativo en la Unión Europea ha tomado fuerza, tanto en los círculos académicos como en la agenda institucional de la Unión. Ello es posiblemente una oportunidad para las soluciones por las que abogaremos posteriormente.

El capítulo cuarto comienza con la difícil tarea proporcionar una definición de procedimientos compuestos que sea jurídicamente válida y omnicomprendensiva, a la vez que simple, así como una justificación para el uso del término "procedimiento compuesto". La dificultad del ejercicio reside en la falta de referencias legislativas y jurisprudenciales. Tras la definición, se establecerá una clasificación entre los distintos tipos de procedimientos compuestos. Esta clasificación es importante porque algunas de las deficiencias de los procedimientos compuestos afectan de distinta forma a los distintos tipos de procedimientos compuestos.

La mayor parte de este capítulo está dedicado al análisis de la legislación existente que establece los procedimientos compuestos. Este ejercicio es también difícil porque los procedimientos compuestos son creados sin referencia alguna a esta categoría y, mientras que en algunos casos los procedimientos se encuentran claramente dentro de la definición dada, algunos otros se encuentran en una zona gris. Los procedimientos compuestos son cada vez más numerosos, en particular en el ámbito de la autorización de productos en el mercado interior. La base lógica de ello es que los Estados miembros son menos reacios a otorgar poderes decisionales a la Unión en la medida en que los poderes sean compartidos a través de un procedimiento compuesto. Sin embargo, otros ámbitos de actuación de la Unión Europea, tales como el espacio de libertad, seguridad y justicia, también cobran relevancia en el caso de procedimientos compuestos establecidos recientemente. Este análisis parte así de una perspectiva práctica y casuística en la observación del fenómeno de los procedimientos compuestos.

Los procedimientos compuestos han ganado recientemente atención doctrinal. Sin embargo, en la mayoría de los casos la aproximación de la doctrina ha sido fragmentaria,

subrayando deficiencias concretas o tipos específicos de procedimientos compuestos. Uno de los objetivos de esta investigación doctoral es la búsqueda de una perspectiva global sobre los procedimientos compuestos. Esto no quiere decir lo mismo que exhaustividad. El número concreto de procedimientos compuestos es difícil de determinar porque cada vez se crean más, y muchos de ellos tienen características peculiares que pueden llevar a problemas particulares que son difíciles de prever antes de que se presente la situación concreta. En este sentido, se presentarán los ejemplos más importantes de procedimientos compuestos.

Estos nueve ejemplos de procedimientos compuestos abarcan desde áreas muy amplias de la acción de la Unión como la política agrícola común, a ejemplos muy específicos como las eco-etiquetas; desde antiguos procedimientos compuestos que han variado a lo largo del tiempo, como la gestión de fondos europeos, a ejemplos muy recientes como el procedimiento para la autorización de biocidas; y desde ejemplos en los que los rasgos de los procedimientos compuestos son fácilmente identificables y que sirven como esquemas útiles para nuestro análisis, como el procedimiento relativo a los pesticidas, a aquellos cuyos rasgos son más difícil, como es el caso de los procedimientos en el área de la libertad, seguridad y justicia. La descripción de los procedimientos específicos que aparecen en el Derecho derivado será esencial para la identificación de las deficiencias que conllevan.

El capítulo quinto de la tesis es el más largo y más relevante. Los derechos del ciudadano en su relación con la Administración Pública se distorsionan de forma sustancial cuando existe más de una autoridad pública interviniente en el procedimiento, cada una de ellas bajo un marco jurídico distinto. Estas distorsiones pueden ser contempladas en tres momentos temporales distintos. En primer lugar, durante el procedimiento administrativo en sí, cuando surge la cuestión de "ante quién" debe el particular ejercitar sus derechos procesales. En segundo lugar, en el momento en que se toma la decisión que pone fin al procedimiento administrativo, la cual cubre las actuaciones practicadas ante distintas instancias administrativas que conforman el *iter* procedimental y con ello la motivación del acto administrativo. En tercer lugar, en el momento en que la actuación administrativa resulta recurrida en los tribunales, dado que la cuestión de qué juez es competente para qué acto administrativo, o parte del mismo, aparece como extremadamente complicada.

De este modo, se pueden identificar tres aspectos como los principales desafíos de los procedimientos compuestos. El primero, durante el procedimiento administrativo, la garantía procesal del derecho a la audiencia antes de la adopción del acto administrativo. El segundo se relaciona al acto administrativo en sí, puesto que la Administración Pública tiene la obligación de motivación de la decisión. El tercero y más importante, el derecho a la tutela judicial efectiva. La concepción y el alcance de esos derechos se analizarán junto a la jurisprudencia de los tribunales de la Unión cuando éstos se han confrontado con los casos concretos relativos a procedimientos compuestos.

Este capítulo se centra así en el análisis crítico de la jurisprudencia existente, identificando los méritos y las deficiencias de las sentencias dictadas hasta ahora. La crítica en esta parte se dirige con más frecuencia a la incapacidad jurídica de los tribunales de la Unión de hacer frente a las deficiencias de los procedimientos compuestos, dada la ausencia de mecanismos para ello que al contenido de las decisiones judiciales, que al propio razonamiento de las mismas. Por esta razón, las soluciones propuestas en lo sucesivo no se refieren tanto a una modificación en la aproximación que hacen los jueces de la Unión como a un cambio legislativo que debe llevar consigo una modificación consecuente de la percepción por los jueces de los procedimientos compuestos y por tanto una modificación en la jurisprudencia sobre ellos. Incluso si se puede adoptar una posición crítica sobre el resultado a que llegan los tribunales de la Unión, en la mayor parte de los casos, es difícilmente imaginable como podrían haber llegado a una conclusión distinta con el marco legislativo vigente.

El capítulo sexto incluye las propuestas para superar las deficiencias identificadas en el capítulo quinto. El objetivo principal de las propuestas presentadas en este capítulo es que las mismas sean omnicomprensivas, en el sentido de que ninguna de las lagunas quede sin cubrir, y que sean eficaces a la hora de hacer frente a los problemas identificados. Aunque el análisis de la oportunidad política de las propuestas de este trabajo no puede tener una atención principal, estas consideraciones también se tienen en cuenta.

En este sentido, la codificación de los procedimientos administrativos no es una mera idea discutida en los círculos doctrinales de expertos en Derecho Administrativo. Una iniciativa formal debe aún ser tomada por la Comisión en este sentido, aunque el tema está ya formalmente en la agenda institucional. Esto ofrece la oportunidad perfecta para un reglamento que defina y regule los procedimientos compuestos en general. Se describirán en este capítulo los detalles técnicos de la propuesta, tales como la base jurídica para ello, o la redacción de algunas de sus normas que resolverían los problemas identificados.

La propuesta es por tanto incluir los procedimientos compuestos en la codificación general de los procedimientos administrativos. A pesar de lo ambicioso de esta propuesta, no sería suficiente para hacer frente a todas las deficiencias identificadas. Puesto que la competencia de los tribunales de la Unión Europea no puede en forma alguna cubrir la totalidad del *iter* procedimental que finaliza en un acto administrativo de la Unión, debe proponerse también un mecanismo de cooperación entre los tribunales de la Unión y los de los Estados miembros. Este mecanismo debería reflejar *mutatis mutandis* el procedimiento prejudicial si bien en un sentido inverso. Se explicarán también los detalles técnicos de esta propuesta a nivel de la modificación del Derecho derivado.

Finalmente, en términos de estructura, debe subrayarse que cada capítulo comienza con unas notas introductorias sobre su relevancia así como la estructura interna del capítulo, a la vez que se vincula el mismo con el resultado del capítulo anterior. De forma similar, cada capítulo acaba con unas conclusiones provisionales. A riesgo de reiterar algunas de las ideas de estas conclusiones con las que se harán al final de la tesis, la estructura de cada capítulo facilita la identificación del resultado del análisis realizado para cada uno de ellos, así como el desarrollo de cada capítulo sobre la base de la conclusión del anterior.

### ***1.3.- Metodología***



Las preguntas a las que este trabajo doctoral pretende dar respuesta no han sido, a mi juicio, contestadas de forma completa hasta la fecha. Estas preguntas son "¿qué son los procedimientos compuestos?, ¿qué problemas traen consigo?, y ¿qué soluciones se puede proponer para hacerles frente?. Se explorará como el tema de los procedimientos compuestos ha ido ganando atención doctrinal y hay un número cada vez mayor de publicaciones sobre el asunto. Sin embargo, la aproximación hasta ahora es fundamentalmente fragmentaria. Se han escrito diversos artículos sobre algún problema en particular identificado en relación con los procedimientos compuestos, o en una sentencia en particular del Tribunal de Justicia, o con ocasión de las oportunidades que se presentan en el marco de la codificación. Este estudio tiene la intención de ofrecer una vista panorámica, tanto de los distintos tipos de procedimientos compuestos, de los diferentes problemas que conllevan, como de las soluciones que se ofrecerán. Esta perspectiva sistemática pretende ser una de las cualidades de esta investigación.

En el proceso interminable de la acumulación de conocimiento, este trabajo tiene la intención de identificar los aspectos que resultan legalmente problemáticos y procurar encontrar soluciones desde una perspectiva lo más amplia posible. Se verá precisamente como esta falta de perspectiva general constituye el origen de muchas de las dificultades relativas a los procedimientos compuestos. La metodología de la tesis se refleja con claridad en su estructura, con una variación para cada una de sus partes.

Los capítulos segundo y tercero se apoyan fuertemente en fuentes doctrinales, fundamentalmente jurídicas, pero no sólo. Otros trabajos del ámbito de la ciencia política también son tenidos en cuenta. Muchas de las páginas de estos primeros capítulos tiene un carácter descriptivo del actual estado de la doctrina, aunque el propósito es poder extraer las conclusiones necesarias para el análisis subsiguiente. De esta forma, los dos primeros capítulos son un requisito previo y necesario para el estudio de los procedimientos

compuestos. Con ello existe el riesgo, común a trabajos que se apoyan en fuentes doctrinales, de dar lugar a listas de citas que se parezcan a una suerte de "guía telefónica sin argumento"<sup>1</sup>.

La idea detrás de los dos primeros capítulos es la de proporcionar pruebas de que existe una Administración Pública de la Unión Europea y existen los procedimientos administrativos de la misma. Simultáneamente a esta labor probatoria, se pone el énfasis en los rasgos peculiares tanto de la Administración Pública de la Unión como en sus procedimientos administrativos. Al hacerlo, el propósito ha sido llevar a cabo un análisis de la doctrina exitoso, lo cual, en palabras de Webster and Watson, es aquel que

"crea unos cimientos firmes para avanzar el conocimientos. Facilita el desarrollo de teorías, cierra áreas en las que existe una plétora de investigaciones, y descubre áreas donde la investigación es necesaria"<sup>2</sup>.

En el capítulo cuarto se realiza un análisis detallado de la legislación existente por la que se establecen los distintos ejemplos de procedimientos compuestos. En esta parte, la tarea consiste en comenzar, de una forma inductiva, en el ejemplo concreto identificado en el Derecho derivado y llevarlo a los esquemas relevantes necesarios para que el investigador pueda realizar una sistematización y, una vez hecha esta, la categoría general pueda ser utilizada para identificar los problemas de los procedimientos compuestos. Un elemento adicional para facilitar la comprensión del lector ha sido la elaboración de cuadros en el que cada procedimiento compuesto pueda ser entendido de un vistazo.

El quinto capítulo se centra fundamentalmente en la jurisprudencia del Tribunal de Justicia. Contiene predominantemente un análisis de la aproximación judicial a los distintos

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<sup>1</sup> Andrew Booth, Diana Papaioannou, y Anthea Sutton, *Systematic Approaches to a Successful Literature Review* SAGE Publications (New York, 2012), p. 3.

<sup>2</sup> Jane Webster, y Richard Watson, "Analyzing the past to prepare for the future: Writing a literature review", 26(2) *MIS Quarterly*, 26, 2, 13-23, p. 13.

desafíos de los procedimientos compuestos, dando cuenta de sus méritos y subrayando sus posibles deficiencias. Este análisis jurisprudencial es complicado porque los tribunales nunca se han referido a los procedimientos compuestos en sí, sino que han resuelto las distintas controversias que se les han presentado de forma diversa. La labor de búsqueda e identificación de los casos relevantes ha sido pues ardua. Además, dada la falta de categoría común, las sensibilidades de los jueces de la Unión han sido distintas en las diferentes áreas, lo que ha complicado el análisis. Las fuentes doctrinales son también importantes, tanto en el comentario de la jurisprudencia como en la primera descripción de cada uno de los desafíos sobre lo que se estructura el capítulo.

El capítulo sexto es el que se apoya menos en fuentes externas, tanto en trabajos doctrinales como en jurisprudencia, y más en las conclusiones de todos los capítulos anteriores. En este capítulo la tesis discurre por sendas relativamente inexploradas, y requiere ciertas nociones sobre el proceso legislativo y las realidades políticas de los procesos institucionales de la Unión. Puesto que aborda la creación de un nuevo marco normativo, con la idea de que sea completamente satisfactorio, es el capítulo más ambicioso y prospectivo.

#### ***1.4.- Agradecimientos***

La idea de dedicar esta investigación doctoral al complejo fenómeno de los procedimientos compuestos tiene su origen en una presentación en Luxemburgo por el profesor Herwig Hofmann. Tuve la inspiración de que a partir de la noción de procedimientos compuestos se podría llevar a cabo un análisis de muchos aspectos de la actualidad del Derecho administrativo europeo. Le agradezco esta fuente inicial de inspiración y sus ideas en reacción a mi interés en aquel momento.

He vivido circunstancias personales y profesionales muy cambiantes durante mi periodo de investigación doctoral. Durante todo el, he tenido el privilegio de contar con el

apoyo constante, las ideas, las reacciones y el entusiasmo de mi director de tesis, el profesor Ángel Manuel Moreno Molina.

Otros académicos y profesionales me han proporcionado ideas importantes que se reflejan en este trabajo. Quiero expresar en particular mi agradecimiento al profesor Alfred Aman que me dio valiosas perspectivas sobre la comparación con la comprensión federal de los procedimientos administrativos en los Estados Unidos, a Kurt Riechenberg, desde hace mucho tiempo letrado en el Tribunal de Justicia, quien me ayudó en la identificación de jurisprudencia relevante más allá de las sentencias citadas habitualmente por la doctrina, así como a la Secretaría de la Comisión de Asuntos Jurídicos del Parlamento Europeo, por sus indicaciones en los antecedentes legislativos de una posible codificación.

Finalmente, me gustaría agradecer a mi familia su comprensión y apoyo en esta tarea. Este proyecto les ha robado algún tiempo. Por ello les estoy agradecido y espero que el resultado de esta investigación les compense.

## CHAPTER 2

### The European Union's public administration

- 2.1.- Justification, method and terminology
- 2.2.- Historical and comparative background of a European public administration
  - 2.1.1.- *Original design of a European public administration*
  - 2.1.2.- *The different models of federalism*
  - 2.1.3.- *The early model of executive federalism in the European integration*
  - 2.1.4.- *The transformation into a new cooperative model*
- 2.2.- The mismatch: today's European public administration and the classical legal approach
  - 2.2.1.- *The traditional legal approach*
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- 2.3.- A European public administration thoroughly different from its national counterparts
- 2.4.- The impact of the European integration process in the European public administration
- 2.5.- The European public administration in the Treaty of Lisbon
  - 2.5.1.- *An open, efficient and independent European administration as an objective in the Treaties. Article 298(2) TFEU*
  - 2.5.2.- *Hierarchy of norms. Articles 290 and 291 TFEU*
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  - 2.5.4.- *Fundamental rights. Articles 41 and 42 ChFR*
  - 2.5.5.- *The constitutionalisation of the European public administration*
- 2.6.- What public administration? A European administration, a Union administration and an integrated administration of the EU.
  - 2.6.1.- *Arguments for a European public administration*
  - 2.6.2.- *The polysemy of a 'European public administration'*
- 2.7.- Conclusions

## **2.1.- Justification, method and terminology**

The comprehensive assessment of composite procedures in the European Union<sup>1</sup> requires the prior analysis of two elements: European public administration and European administrative procedure.

This first chapter will cover the European Union's public administration. This is not a merely academic *apriori* or aesthetic exercise. Few legal scholars have traditionally used the term 'European public administration', and fewer have written extensively on it. The state of affairs has changed with the entry into force of the Treaty of Lisbon, as it enshrined the term European public administration. Even with the mention in the Treaties, the existence of a public administration of the European Union cannot be taken from granted. One cannot forget that the '*Administration publique*', as first conceived in France, was born as the management apparatus of the executive power. Its birth is hence intimately linked to the modern State where the separation of powers prevailed.

Only with difficulties can one support the statement that the separation of powers exists in the European Union in a likewise fashion as in member States. That is why the academic elaboration on the existence of a European administration must go farther than the formalistic argument 'because the Treaty so says'. Thus, the question whether a public administration does exist at the European Union level will be analysed in detail.

As important as the questioning of the existence of a European public administration is the analysis of the features and trends that characterise the EU public administration today. What it is differs greatly from how it was designed, and this aspect has a paramount importance for the subsequent development of the thesis. As we shall see, the emergence and proliferation of composite procedures is indeed one of the

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<sup>1</sup> The Union has replaced and succeeded the Community (Article 1 (3) TEU). This article will use the terms 'EU' and 'Union' including where it refers to what was pre-Lisbon the Community; except where the historical context requires otherwise.

most remarkable features of a public administration that no longer decides so others (member States) execute, but often cooperates with them in implementing policies that have been subject to common agreements through different legal instruments.

The existence of an EU public administration is a necessary condition for the existence and assessment of the administrative procedures of the EU. Once the existence of an EU public administration is settled and its properties are outlined, the analysis of the different categories of administrative procedures to carry out its activities will be pertinent.

There is also a terminological question which is much related to the different legal traditions within Europe. To the British tradition, public administration is an imported set of words from France that has never been part of their public law tradition. The famous allocation of Dicey there is not such a thing a *Droit administrative* in Britain speaks for itself. For the British, public administration is a alien term, a Gallicism at best, which can lead to misunderstandings, not to speak of the North American conception by which administration is considered what we, in continental Europe, call government.

For the sake of clarification, the term public administration shall be used in the sense that it is traditionally understood in continental Europe, heir to the French *Administration Publique*, and indeed used in the European Union *acquis*. That is as the public machinery at the service of the executive power, however difficult it is to determine such concepts at the European Union level.

## ***2.2.- Historical and comparative background of a European public administration***

### ***2.1.1.- Original design of a European public administration***

The existence of a European public administration has been subject to academic debate, and many scholars had doubts whether the administrative structure of the European Communities qualified as an authentic public administration or was rather a large and complex general secretariat of an international organisation, being the national

public administrations the bodies primarily in charge of executing EU law<sup>2</sup>. The existence of a public administration is a prerequisite for the legal assessment of the administrative procedures that stem from it. Although doubts on the existence of a European public administration have largely dissipated after the Treaty of Lisbon<sup>3</sup>, the proper conceptualization of the EU public administration and its strong connections with national administrations encompass the organizational framework for composite procedures.

Throughout history, public administration has come hand-in-hand with the modern concept of nation-state. From the sixteenth century, modern Western European states needed an organisation integrated by expert civil servants for the implementation of law and order and for setting up a defensive structure<sup>4</sup>. Given the strong linkage of public administration to the essence of the nation-state<sup>5</sup>, it is very difficult to define a simple notion of the European or EU public administration<sup>6</sup>.

Originally, the cession of sovereignty in the early European Communities put into question the classical principle of territoriality of public law<sup>7</sup>, under the old maxim *quidquid est in territorio, est etiam de territorio*. Although Member States allowed public power to be exercised externally to their own territorial base and organization, they did not create a new administration with parallel powers to national public administrations. On the contrary, there was a lack of a European public administration, in the sense of a bureaucracy ready to carry out the implementation of the new common

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<sup>2</sup> Jérôme Roux, *Droit Général de l'Union Européenne*, LexiNexi (Paris, 2010), at 99.

<sup>3</sup> In particular, article 298 (1) TFEU. The consequences of the Treaty of Lisbon shall be assessed in detail in Section 2.5.

<sup>4</sup> Christopher Thornhill and Gerda van Dijk, "Public Administration Theory: Justification for Conceptualisation", 45(1) *Journal of Public Administration* (2010), 95-110, at 99.

<sup>5</sup> Øivind Støle, "Towards a Multi-Level Community Administration? The Decentralization of EU Competition Policy", in Morten Egeberg (ed.), *Multilevel Union Administration. The transformation of Executive Politics in Europe*, Palgrave Macmillan (Houndmills, 2006), 86-102, at 89.

<sup>6</sup> Mario Chiti, a pioneer scholar in the field of European Administrative Law, understands that the legal notion of public administration from a EU perspective is very problematic. The notion itself varies depending on the context of reference and techniques used for the development of the integration process. See, Mario Chiti, *Diritto Amministrativo Europeo*, Giuffrè Editore (Milan, 2011), at 283.

<sup>7</sup> Herwig H. C. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy in the European Union*, Oxford University Press (Oxford, 2011), at 6.



policies. But this was wisely circumvented with the scheme of the so-called “indirect administration”.

The founding father Jean Monnet explains in his *Mémoires* the problems concerning the scarcity of administrative capabilities he found in the establishment of the European Coal and Steel Community. The High Authority had very limited human and material resources, but the first officials and units did have the necessary relays with national public administrations to make the European project take off<sup>8</sup>. So rather than doing (*faire*), the High Authority would make others do (*faire faire*).

In such a way, the old Communities could administer their policies “indirectly”. According to Monnet, it was sufficient to have a few hundreds European officials in order to put thousands of national experts to work. They would make the powerful administrative machineries of Member States (*les puissantes machineries des États*) serve the mission of the Treaty<sup>9</sup>. This pragmatic approach prevailed over the more idealistic view of a political structure resembling a federal State, advocated by Altiero Spinelli, where the Union would enjoy administrative powers<sup>10</sup>.

The initial setup was a dual administrative order in which the administration of common European policies took place indirectly through lower-level national administrations, in what was originally called in French *mise en oeuvre indirecte* (indirect implementation). From that point of view, many scholars described the early Communities as a federal system<sup>11</sup>, owing to the fact that the federal idea entails a

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<sup>8</sup> Jean Monnet, *Mémoires*, Le livre de poche (Paris, 2007), at 544.

<sup>9</sup> Monnet, *Mémoires...*, at 545.

<sup>10</sup> Claudio Franchini, "Les notions d'administration indirecte et de coadministration", in Jean-Bernard Auby, and Jacqueline Dutheil de la Rochère (eds.), *Traité de droit administratif européen*, Bruylant (Brussels, 2007), 245-65, at 246.

<sup>11</sup> William H. Riker, *Federalism: Origin, Operation, Significance*, Little, Brown and Company (Boston, 1964), 11. He points out that the European Communities, and the ECSC in particular, had clear federal traits from the beginning. For a general study of the federal characterization of the Communities as a federal entity see for instance Michael Burgess “Federalism and the building of Europe 1950-72”, in Michael Burgess (ed.), *Federalism and European Union: The Building of Europe, 1950-2000*, Routledge (London, 2000), 55-100; and David Kelemen, “The structure and dynamics of EU federalism”, 36(1-2) *Comparative Political Studies* (2003), 184-208.

means of structuring the relationship between interlinked authorities<sup>12</sup> with a balance of powers allotted to the central authority and the component entities. The tenet of federalism is the combination of self-rule and shared-rule<sup>13</sup>. This feature was thus present in the foundations of that early architecture.

The peculiarity of the system, unique to the EU, but federal in substance<sup>14</sup>, lied in the fact that national authorities act on behalf of European law<sup>15</sup>. This system became known as “executive federalism”, being first conceptualised by German tradition as *Vollzugsföderalismus*<sup>16</sup>. It is best described by the current president of the Court of Justice, judge Lenaerts as a system “in which component entities become agents for the application and enforcement of the policy choices made at the central level.”<sup>17</sup>

With regard to the design of the administrative machinery of the ECSC, first, and the three Communities, afterwards, in itself, the most decisive influence was that of the French *Administration Publique* model. Historically, administrative law itself traces its origins in the post-revolutionary France<sup>18</sup>.

Upon the recognition of citizens' rights in the *Déclaration des Droits de l'homme et du citoyen* as well as the separation of powers, the modern Administration appears with some of its current traits<sup>19</sup>. The creation of the *Conseil d'État* is generally identified

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<sup>12</sup> Koen Lenaerts, “Federalism: Essential concepts in evolution: the Case of the European Union”, 21(3) *Fordham International Law Journal* (1997), 746-98, at 748

<sup>13</sup> Daniel Judah Elazar, “Exploring federalism”, University of Alabama Press, (Tuscaloosa, AL, 1987), at 5.

<sup>14</sup> Nicholas Aroney, “Federal Constitutionalism/European Constitutionalism in Comparative Perspective”, in Gert-Jan Leenknecht (ed.), *Getuigend Staatsrecht: Liber Amicorum A. K. Koekkoek*, Wolf Legal Publishers (Tilburg, 2005), 229-51, at 245. This author identifies a number of features, like the ones discussed above, that are similar to the institutional foundations of the other federal States

<sup>15</sup> Philipp Dann, “Looking through the federal lens: The Semi-parliamentary Democracy of the EU”, Jean Monnet Working Paper Series No. 5/2002, at 6, available at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/02/020501.pdf>

<sup>16</sup> Alan Fenna, “Federalism and Intergovernmental Coordination”, in Guy Peters and Jon Pierre (eds.), *Handbook of Public Administration*, Sage Publications (Thousand Oaks, CA, 2003), 750-63, at 752.

<sup>17</sup> Lenaerts, “Federalism: Essential concepts ...”, at 765.

<sup>18</sup> Eduardo García de Enterría and Tomás Ramón Fernández, *Curso de Derecho Administrativo, vol 1*, Civitas, (2008), at 30.

<sup>19</sup> Didier Truchet, *Droit administratif*, Thémis, (Paris, 2008), at 34.

as the moment of birth of the law discipline for the Public Administration, that is, Administrative law<sup>20</sup>.

Subsequently, at the end of the 19th Century, the two classical French schools of Public Administration appeared. The School of Toulouse led by professor Hauriou insisting on the special prerogatives of the Administration as an institution, on the one hand; and the School of Bordeaux led by professor Duguit focusing on the functions of the Administration, notably, the function of public service. From one or the other perspective, the French conception of public Administration entails a special status thereof, with a special discipline of law. This means that Public Administration is not subject to general private law, but an isolated discipline with a focus on protection of the public interest<sup>21</sup>, and that the relationships of civil servants with it is also different from a normal employment relationship.

The model of the French *Administration Publique* was exported, or at least was heavily influential, in other European countries and beyond<sup>22</sup>. This was certainly reflected in the original design of the Administration of the early communities. Indeed, the model of the French Administration was reflected in the organisation of the early Communities not only for reasons of inertia, but it was precisely the intention of Monnet to have permanent officials devoted to the general interest of the Communities, instead of a model of seconded national servants on a temporary basis<sup>23</sup>. This system would ensure the attainment of the objectives of European integration. Later on, the structures grew and the following president of the Commission, Mr Hallstein, introduced the further hierarchies inspired in the German model<sup>24</sup>.

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<sup>20</sup> Jan-Bernard Auby and Lucie Cluzel-Métayer, "Administrative Law in France", in René Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States*, Intersentia (Cambridge, 2012), 5-38, et 5.

<sup>21</sup> Olivier Gohin, *Institutions administratives*, Librairie Générale de Droit et Jurisprudence (Paris, 2006), at 8.

<sup>22</sup> Martin Painter and Guy Peters, "Administrative Traditions in Comparative Perspective: Families, Groups and Hybrids", in Martin Painter and Guy Peters, *Tradition and Public Administration*, Palgrave (Basingstoke, 2010), 19-30, at 21.

<sup>23</sup> Anne Stevens, "Les hauts fonctionnaires de l'Union Européenne: uniformité statutaire et diversité culturelle", in Françoise Dreyfus, Jean-Michel Eymeri (eds.), *Science politique de l'administration : Une approche comparative*, Economica (Paris, 2006), 9-27, at 12.

<sup>24</sup> *Ibid.* at 13.

However, even with this initial conception of a French Public Administration, which would evolve later taking on board certain aspects of the Anglo-Saxon administration too, was never fully-fledged. It remained dependent on national Administrations to execute the policies of the Communities, theoretically through indirect administration, and later progressively through shared schemes.

### *2.1.2.- The different models of federalism*

There are traditionally two models of federalism: dual federalism and cooperative federalism<sup>25</sup>. The gist of dual federalism lies in the institutional autonomy of the different levels of government with a clear vertical separation of powers in which competences are allocated according to policy sectors, not policy functions. As a result, both legislative and executive powers are found in either level. At the same time, representation of component entities is weak at the central level. The archetype of this model is the original federalism of United States of America<sup>26</sup>.

On the other hand, the model of cooperative federalism model is based on a functional division of powers between the different levels of government. While the central authority legislates, component entities are responsible for implementing legislation. This results in many shared competencies and a strong representation of the component entities at the central level. The prime example of this type of federalism is Germany<sup>27</sup>.

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<sup>25</sup> See further details in Tanja A.Börzel and Thomas Risse, "Who is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System", Jean Monnet Working Paper Series No. 5/2002, at 11, available at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/00/00f0101.html>

<sup>26</sup> The dual model of federalism was descriptive of the United States' political system only at its origins and throughout the nineteenth century. The Civil War led to substantive modifications of this model, but it was in the 1930's when most authors agree that Roosevelt's New Deal together with the Supreme Court's landmark ruling *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) of 12 April 1937 changed the system to a more cooperative version of federalism, see Harry N. Scheiber, "Federalism and Legal Process: Historical and Contemporary Analysis of the American System", 14 *Law & Society Review* (1979), 663-722, at 667. However, many of the original features of that model still exist today.

<sup>27</sup> Søren Dosenrode, "Policy-making in Federations and in the EU", in Søren Dosenrode (ed.), *Approaching the European Federation*, Ashgate (Aldershot, 2007), 59-86, at 70. This model is also called the continental model as its features are also present, albeit less intensely, in Austria and Switzerland.

Authors have argued that the “confrontative” American model of federalism<sup>28</sup>, where there is a powerful autonomy of each level of government together with a clear separation of the executive, legislative and judicial branch of government contrasts<sup>29</sup> with the “dynamic confusion of powers” in the European Union<sup>30</sup>. Professor Guy Isaac defined executive federalism as opposed to the federal system of the United States because the Community system is centralized when it comes to the law-making powers, but it is scattered as regards the executive action<sup>31</sup>. However, there are interesting lessons to be learned from the evolution of American federalism; the early American theorists did not conceive a “federal state” until after the late 19<sup>th</sup> Century as the word “state” was restricted to the parts of the Union<sup>32</sup> and the American Constitution was deemed in part an international instrument<sup>33</sup>.

Administrative implementation by member States is the paradigm of the cooperative rationale, but it goes farther than the German model. On the one hand, because competences of both levels overlap and, on the other hand, because of the wide powers of the constituent parties. This feature, which has been an updraft trend until today, leads to the core idea of this work.

### 2.1.3.- *The early model of executive federalism in the European integration*

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<sup>28</sup> Søren Dosenrode, “Federalism Theory and Neo-Functionalism: Elements for an analytical framework”, 2(3) *Perspectives on Federalism* (2010), 1-28, at 11.

<sup>29</sup> A detailed comparative analysis of the American and EU federalism can be found at Mark Tushnet (ed), *Comparative Constitutional Federalism: Europe and America*, Greenwood Press (New York, 1990).

<sup>30</sup> See more on the contrast between the two models in Vivien Schmidt, “Federalism and State Governance in the European Union and the United States: An Institutional Perspective”, in Kalypso Nicolaidis and Robert Howse (eds.) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford University Press (Oxford, 2001), 335-54, at 339.

<sup>31</sup> For reference to a classic academic work on the Community system, see Guy Issac, *Droit Communautaire Général*, Masson (Paris, 1983), at 185.

<sup>32</sup> Kalipso Nicolaïdis, “Conclusions: The Federal Vision beyond the Federal State”, in Kalipso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Government in the United States and the European Union*, Oxford University Press (Oxford, 2001), 443-82, at 444, affirms “to be sure, none of the pre-civil war American thinkers on federalism [...] saw the United States as a ‘federal state’. For them the word ‘state’ still denoted not the whole but the parts of the union.”

<sup>33</sup> Alexander Hamilton, James Madison, John Jay, and Terence Ball, *The Federalist: with Letters of Brutus*, Cambridge University Press (Cambridge, 2003), 187; cited in Robert Schütze, *From dual to cooperative federalism. The changing structure of European law*, Oxford University Press (Oxford, 2009), 58. Hamilton stated that the American Constitution was “in strictness, neither national nor international, but a composition of both”.

The scheme of executive federalism was both possibilistic and ambitious in its origin<sup>34</sup>. It was effective for the execution of the European policies, and came up as acceptable for member states whose administrative organisation and powers remained untouched<sup>35</sup>. Member states should be in charge of the transposition and application of EU legislation. The monitoring role of the Commission in this respect did not in itself change this division of labour between levels of governance. Indirect implementation portrays the Union as a system in which the constituent states are integrated into a larger whole as coherent entities<sup>36</sup>.

This early architecture still remains in EU law; in particular, in the general principle laid down in article 291(1) TFEU<sup>37</sup> which states that member states shall adopt all measures of national law necessary to implement legally binding Union acts. Implementation at the central level is possible but exceptional, conferring implementing powers upon the Commission in specific cases<sup>38</sup>.

It was later captured most clearly in the Declaration No 43 annexed to the Treaty of Amsterdam:

“The High Contracting Parties confirm ... that the administrative implementation of Community law shall in principle be the responsibility of the

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<sup>34</sup> See for a historical overview of 'executive federalism' along European integration, Robert Schütze "From Rome to Lisbon: "Executive Federalism" in the (New) European Union", 47(5) *Common Market Law Review* (2010), 1385-1427.

<sup>35</sup> See Deidre M. Curtin and Morten Egeberg, "Tradition and innovation: Europe's accumulated executive order", 31(4) *West European Politics* (2008), 639-61, at 649.

<sup>36</sup> *Ibid.*, at 650.

<sup>37</sup> Article 291(2) TFEU reads: "Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council."

<sup>38</sup> Direct implementation by the Commission is common in the field of competition law. Article 105 TFEU confers the powers of application of antitrust provisions in articles 101 and 102 TFEU upon the Commission; article 106 TFEU likewise entrusts the Commission with the antitrust control of public undertakings; article 108 TFEU stipulates the direct responsibility of Commission on state aid cases; and article 22(2) of the Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, 1-22)) awards the Commission exclusive powers concerning mergers of EU dimension. Besides, article 317 TFEU provides that the Commission shall implement its own budget on its own responsibility, although in cooperation with Member States. See Hofmann, Rowe and Türk, *Administrative Law and Policy ...*, at 259-260.

Member States in accordance with their constitutional arrangements. This shall not affect the supervisory, monitoring and implementing powers of the Community Institutions as provided under Articles 145 and 155 of the Treaty establishing the European Community.”

In addition to that Declaration, many scholars highlight that the lack of legal basis in the Treaties for a common administrative policy is a solid piece of evidence of the general preference for the indirect administration<sup>39</sup>. There is no EU legislation enacting general rules or horizontal standards for national administrations to implement EU law<sup>40</sup>, and the first steps in codification of EU administrative procedure have barely been taken<sup>41</sup>. The general rule is that member states act autonomously in executing EU law<sup>42</sup> or, in other words, they retain “administrative sovereignty”<sup>43</sup>. As professor Weiler observed, Member States “often act as, and indeed are, the executive branch of the Union”<sup>44</sup>.

Professor Olsen argues that from a historical point of view, the EU has given only modest attention to administrative issues. The focus has been placed on policy making and substantive results rather than administrative arrangements<sup>45</sup>; which is evidenced by the little attention initially awarded to administrative procedures<sup>46</sup>. According to Olsen, neither the Treaties nor the *acquis communautaire* prescribe a

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<sup>39</sup> Stefan Kadelbach, “European Administrative Law and the Law of a Europeanized Administration”, in Christian Joerges, and Renaud Dehousse (eds.), *Good governance in Europe's integrated market*, Oxford University Press (Oxford, 2002), 167-206, at 167.

<sup>40</sup> Hans Petter Graver, “National Implementation of EU Law and the Shaping of European Administrative Policy”, ARENA Working Papers 02/17, at 2, available at [http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2002/wp02\\_17.htm](http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2002/wp02_17.htm)

<sup>41</sup> The prospects of EU codification are assessed in section 3.4.5.

<sup>42</sup> Kadelbach, “European Administrative Law...”, at 172.

<sup>43</sup> Curtin and Egeberg, “Tradition and innovation...”, at 650.

<sup>44</sup> Joseph H. H. Weiler, “The Jurisprudence of Human Right in the European Union: Integration and Disintegration, Values and Processes”, 2 *Harvard Jean Monnet Working Paper* (1996), at 4.

<sup>45</sup> Johan P. Olsen, “Towards a European Administrative Space?”, 10(4) *Journal of European Public Policy*, 506-31, at 512. He explains that the Santer Commission resignation in 1999 after accusations of mismanagement placed administrative reform to the top of the Commission’s agenda, yet an administrative policy is still not developed.

<sup>46</sup> Mario Chiti, *Derecho Administrativo Europeo*, Civitas (Madrid, 2002), at 237; and Giacinto della Cananea, “I procedimenti amministrativi dell’Unione Europea”, in Mario P. Chiti and Guido Greco, *Trattato di Diritto Amministrativo Europeo. Tomo I*, Giuffrè Editore (Milan, 2007), 497-536, at 500.



specific model of public administration. A variety of national administrative systems are acceptable, without interference from the Union, as long as Union obligations are followed and common rules are implemented<sup>47</sup>.

Jürgen Schwarze highlights that administrative instruments that leave discretion to member states have traditionally been more popular than those imposing specific administrative solutions<sup>48</sup>, and the European institutions have never been granted a general organizational, supervision or enforcement competence due to the resistance of member states.

As professor Chiti has put it, the organisational autonomy of Member States allows them to remain anchored in their own domestic administrative systems, without a formal influx from the Union and operating autonomously from other Member States<sup>49</sup>. But these words remain at a purely theoretical level, and professor Chiti acknowledges that it is erroneous to believe that indirect execution excludes any involvement of the European authorities in the implementation process<sup>50</sup>. There are both formal and informal channels of influence. Among the former would be the many contacts between the EU officials and the relevant national offices. Among the later would be the plethora of information exchange mechanisms and coordination schemes which will be assessed in detail later in this work.

Furthermore, the Commission has long advocated that implementation of common policies must be “as decentralized as possible” in its White Paper on European Governance so that the diversity of local situations are better taken into account<sup>51</sup>. This

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<sup>47</sup> Olsen, “Towards a European Administrative...”, at 512.

<sup>48</sup> Jürgen Schwarze, “The Europeanisation of Administrative Law”, in Jürgen Schwarze (ed.) *Administrative law under European influence : on the convergence of the administrative laws of the EU member states*, 789-840, Sweet & Maxwell/Nomos (London, 1996), 789-840.

<sup>49</sup> Mario Chiti, “The Administrative Implementation of European Union law: a taxonomy and its implications”, in Herwig C. H. Hofmann and Alexander H. Türk, (eds.) *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, Edward Elgar Publishing (Cheltenham , 2009), 9-33, at 13.

<sup>50</sup> *Ibid.*

<sup>51</sup> White paper on European Governance COM (2001) 428 final, available on [http://ec.europa.eu/governance/white\\_paper/index\\_en.htm](http://ec.europa.eu/governance/white_paper/index_en.htm) .



White Paper proposed the opening up of the policy-making process to get more citizens and organizations involved in shaping and delivering EU policy.

This means that the Commission intends to go farther than the indirect administrative action schemes assume, providing decision-making processes with more legitimacy<sup>52</sup>, and bringing greater flexibility into how EU legislation is implemented. Thus, it should take into account regional and local conditions and establishing a more systematic dialogue with civil society. In other words, it results from this White Paper that the Commission wants to promote decisional partnerships and reshape the relationships it holds with national authorities from a one-direction, decide-and-execute pattern to cooperative networks involving not only its national counterparts, but also regional, local and civil society stakeholders<sup>53</sup>.

#### *2.1.4.- The transformation into a new cooperative model*

The system of indirect administration has played a central role in the development of the administrative action of European Union and it is still enshrined in several provisions of primary law. Nevertheless, legal academia increasingly ascertains that this dual administrative system is under profound transformation<sup>54</sup>.

The dichotomy direct-indirect administration is far from representing the current state of affairs in EU law implementation, because the question is not whether competences of execution lie at either the European level of administration or the national level, but rather on what cooperative scheme exists between them<sup>55</sup>. The logic

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<sup>52</sup> Marcus Höreth, "The European Commission's White Paper on Governance: A 'Tool-Kit' for closing the legitimacy gap of EU policymaking?", Zentrum für Europäische Integrationsforschung, Rheinische Friedrich Wilhelms-Universität Bonn, Discussion Paper C94/2001, at 5.

<sup>53</sup> Mario Telò, "Combiner les instruments politiques en vue d'une gestion dynamique des diversités nationales", in Christian Joerges, Yves Mény, Helen Wallace, and Joseph H. H. Weiler (eds.), *Mountain or Molehill? A Critical Appraisal of the Commission's White Paper on Governance*, Jean Monnet Working Paper No. 6/01, 13-21, at 20.

<sup>54</sup> See for a general view of the current scholarly though, Maria Martens, *Organized administrative integration: The role of agencies in the European administrative system*, ARENA Report Series (Oslo 2010), at 6-7, at [http://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2010/Report\\_02\\_10.pdf](http://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2010/Report_02_10.pdf)

<sup>55</sup> Franchini, "Les notions d'administration indirecte et de coadministration....", at 263.

of separation is being progressively overshadowed by the logic of cooperation<sup>56</sup>, even though there usually is still a distribution of administrative tasks in many fields.

There were clear-cut examples of cooperative rather than indirect schemes of administrative execution as far back as in the 1960s, as former president of the European Court of Justice Rodríguez Iglesias has revealed<sup>57</sup>. Professor Cassese also pointed out that cooperation between European and national authorities in EU law implementation was more and more present, in opposition to pure indirect administration<sup>58</sup>. This trend was exposed by a growing number of networks between national administrations and Commission's services, according to the analysis of professor Wessels<sup>59</sup>. Legal scholars began speaking of a shared administration empowered with the implementation of EU policies according to mechanisms that did not strictly fit into the category of indirect administration<sup>60</sup>.

The decline of indirect administration was, understandably, in parallel with the rise of coordinated administrative action<sup>61</sup>. From a political science perspective, there is a structural change. The former autonomy between administrative units which was predominant in the early European Communities has given way to administrative integration, which translates into further cooperation and development of common

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<sup>56</sup> Eberhard Schmidt-Assmann, "Introduction: European composite administration and the role of European administrative law", in Oswald Jansen and Bettina Schöndorf-Haubold (eds.), *The European Composite Administration*, Intersentia (Antwerpen, 2011), 1-22, at 4. In this sense, see also Sabino Cassese, "European Administrative Proceedings", 68 *Law and Contemporary Problems* (2004), 21-36, at 22 and Craig, *EU Administrative Law...*, at 70.

<sup>57</sup> Gil Carlos Rodríguez Iglesias, "Sui limiti dell'autonomia procedimentale e processuale degli Stati membri nell'applicazione del diritto comunitario", 1 *Rivista italiana di diritto pubblico comunitario*, (2001) 5-28, at 5.

<sup>58</sup> Sabino Cassese, "Theoretical Sketch of Cooperative and Multidimensional Nature of Community Bureaucracy", in Joseph Jamar and Wolfgang Wessels (eds.) *Community bureaucracy at the crossroads: L'Administration communautaire à l'heure du choix : actes du colloque Collège d'Europe*, De Temple (Bruges, 1985).

<sup>59</sup> Wolfgang Wessels, "Comitology: Fusion in Action. Politico-Administrative Trends in the EU system", 5(2) *Journal of European Public Policy*, (1998), 209-34.

<sup>60</sup> Among the scholars who first called the attention on the increase of this shared administration; Eberhard Schmidt-Assmann, "Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft", *Europarecht* (1996) 270-301; Edoardo Chiti and Claudio Franchini, *L'Integrazione Amministrativa Europea*, Il Mulino (Bologna, 2003); and Sabino Cassese, "European Administrative Proceedings", 68 *Law and Contemporary Problems* (2004) 21-36.

<sup>61</sup> Mario Chiti, "Forms of European Administrative Action", 68 *Law and Contemporary Problems* (2004), 37-57, at 37.

practices and proceedings<sup>62</sup>. Thus, the Union authorities are getting progressively involved in the implementation activities undertaken by member state authorities; simultaneously, national administrations are taking an active role in the creation of EU legislative and implementing acts<sup>63</sup>. The trend is becoming more intense as the subnational actors start to participate in the process<sup>64</sup>. This trend runs in parallel to a shift the European administrative setup moved from the traditional, hierarchical model of French origin to a more open, flexible one<sup>65</sup>.

In sum, there is a consensus that the European Union has reached a further stage of cooperative federalism<sup>66</sup>, a complex structure of multilevel administrative interaction<sup>67</sup> where cooperation between the national and EU administrative actors is intense in all phases; that is, in agenda setting, decision-making or implementation. The functions of the both public administrations in all phases of the policy circles are interwoven and the traditional distinction between direct and indirect administration is now blurred<sup>68</sup>.

It is important for our legal assessment to see reality as it is, not as our old paradigms say it should ideally be; because problems and inconsistencies arise due to

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<sup>62</sup> Johan P. Olsen, *Europe in search of a Political Order*, Oxford University Press (Oxford, 2007), 96.

<sup>63</sup> Herwig C. H. Hofmann and Alexander H. Türk, "The challenges of Europe's integrated administration", in Erik O. Eriksen and Christian Joerges, (eds.) *Law, Democracy and Solidarity in Europe's Post-National Constellation*, "Law and Democracy in the Post-National Union", ARENA (Oslo, 2006), 107-24, at 107-108. According to them, this twofold trend invalidates the traditional scheme.

<sup>64</sup> Morten Egeberg, "Europe's Executive Branch of Government in the Melting Pot", Morten Egeberg (ed.) *Multilevel Union Administration. The transformation of Executive Politics in Europe*, Palgrave Macmillan (Houndmills, 2006), 1-16, at 12.

<sup>65</sup> This evolution is partly related to the shift in the balance of powers among member States, and the decreased influence of France and other countries with a large French influence in their public administrations, like Italy, in the European Communities of the first enlargement of 1973 which included the United Kingdom and which became subject to the powerful impact of the Anglo-Saxon tradition. Most of the studies of administrative reform at the time had an Anglo-Saxon perspective which largely influenced all subsequent changes. From the 1980's decentralization and creation of the first agencies mark a new era for the administrative structures of the Union.

<sup>66</sup> Tanja A. Börzel and Madeleine O. Hosli "Brussels between Berlin and Bern: Comparative Federalism meets the European Union", Working Paper 2/2002, Vrije Universiteit Amsterdam, Department of Political Science, at 11.

<sup>67</sup> Herwig C. H. Hofmann, and Alexander H. Türk, "Conclusion: Europe's Integrated Administration", in Herwig C. H. Hofmann, and Alexander H. Türk (eds.) *EU Administrative Governance*, Edward Elgar Publishing (Cheltenham, 2006), 573-96, at 586.

<sup>68</sup> Hofmann and Türk, "The challenges of Europe's...", at 108.

the disparate evolution of the EU administrative action and the static legal and procedural framework and judicial architecture of the Union.

## ***2.2.- The mismatch: today's European public administration and the classical legal approach***

### *2.2.1.- The traditional legal approach*

There is a growing divergence between the traditional conception of law and the reality of today's European public administration. The evolution of European integration has reached a point where the European public administration is characterised by a non-hierarchical, flexible and interwoven relationship with national administrations and the uptake of new governance approaches<sup>69</sup>.

The traditional legal conception was associated with the classic Community method. Although this method evolved through time<sup>70</sup>, it is characterised, as in former times, by clear rules, formal –even if sometimes complex– procedures, and institutional balance remaining within the limits of certain public entities of the Union. A noteworthy paradox is that even though the Community method has progressively increased its scope<sup>71</sup>, the emergence of new governance tools imply that the old approaches are increasingly unfit to describe how the European Union actually functions. Joanne Scott and David Trubek underline the main reasons for this phenomenon<sup>72</sup>:

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<sup>69</sup> See Renaud Delhousse “Misfits: EU Law and the Evolution of European Governance”, in Christian Joerges and Renaud Dehousse, *Good Governance in Europe's Integrated Market*, Oxford University Press (Oxford, 2002), 207-29.

<sup>70</sup> What is usually referred to as the Community method has significantly evolved through time. In the early times, it implied the compromise between the Commission, representing the Community's interest, and the Council of Ministers, representing the national interest of member states, often unanimously. Nowadays, under the scheme of institutional dialogue, the European Parliament has reached equal footing with the Council, which is almost always subject to qualified majority voting. See on the evolving Community method, Alex Warleigh-Lack and Ralf Drachenberg, “Policy Making in the European Union”, in *European Union Politics*, Michelle Cini and Nieves Perez-Solorzano Borraran (eds.), Oxford University Press (Oxford, 2010), 209-224, at 212.

<sup>71</sup> The Treaty of Lisbon has been a benchmark in this evolution as it has eliminated the former three pillar structure gathering all the EU policies under a single general ‘method’ which is equivalent of the previous EC method, although there are notable exceptions to the general method in some policy areas. See Koen Lenaerts, and Piet Van Nuffel, *European Union Law*, Sweet & Maxwell (Andover, UK, 2011), 67.

<sup>72</sup> Joanne Scott and David M. Trubek, “Mind the Gap: Law and New Approaches to Governance in the EU”, 8 *European Law Journal* (2002), 1-18, at 8.

- the traditional conception of law looks for a unitary source of ultimate authority, but the EU acts rather upon a dispersal and fragmentation of authority, and rests upon fluid systems of power sharing;

- the former clear distinction between rule making on the one hand, and rule application and implementation on the other no longer holds true. Instead, indeterminate and flexible rules are adapted to meet new challenges and resolve unexpected problems;

- while a traditional conception of law might see itself as predicated upon existing knowledge, the emphasis is now put upon the need to facilitate the continuous generation of new knowledge;

- hierarchies are not the only pattern of administrative organisation; and

- courts no longer retain the monopoly on securing real accountability.

As De Búrca has argued, there is a fundamental tension between the traditional constitutionalism focused on limited, clear and visible EU powers and the reality of a pragmatic, flexible and interwoven form of governance which is in permanent expansion<sup>73</sup>. Most European administrative law scholars<sup>74</sup> have identified a growing gap between, on the one hand, the proliferation of new forms of administrative action in the Union and their regulatory framework and, on the other hand, their integration into a coherent system of protection of procedural guarantees and general principles related to good administration.

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<sup>73</sup> Gráine de Búrca, “The Constitutional Challenge of New Governance in the European Union”, 28 *European Law Review* (2003), 814-39, at 814. In her more eloquent words there is “...a fundamental tension between the powerful political attachment to a traditional and high form of constitutionalism which is focused on limited EU powers, clarity in the division of competences between states and the EU, and the shaping of an effective and visible EU government on the one hand; and the reality of a highly reflexive and pragmatic form of governance entailing the expansion of EU activity into virtually all policy fields, a profound degree of mixity in terms of the sharing of competence between levels and sites of decision-making, and the existence of a dense and complex system of governance alongside the formal structures of government.”

<sup>74</sup> See in this sense the paper presented at the ReNEUAL conference of EU administrative procedures in Brussels on 19-20 May 2014, “Draft Model Rules on EU Administrative Procedures Introduction/Book I General Provisions”, at 8.

### 2.2.2.- New Governance approaches

In other words, the old-rooted model of indirect administration which many lawyers have been using as a centre of gravity for the assessment of administrative action is becoming in a large part obsolete. Political science used the term “new governance” for at least three decades now to refer to a new specific pattern of resolving common public problems, a centrifugal model of public action characterized by devolution and centreless society<sup>75</sup>. In this vein, there is a proliferation of public-private partnerships or, more generally, a reliance on different forms of cooperation with the public sector for the management of public affairs<sup>76</sup>.

New governance approaches did not emerge in order to describe special features of the European Union, but observers agree that its characteristics apply to how the EU carries out its administrative action much more intensely than at the national level<sup>77</sup>.

It is difficult to find a consensual univocal definition of new governance that all authors could fully agree upon<sup>78</sup> but the gist of new governance lies in the contrast with the traditional bureaucratic public administration<sup>79</sup>. Professor Rosenau in his often cited work “Governance without Government” deduced that the essence of the phenomenon was in authority simultaneously moving up towards supranational entities and down to subnational actors<sup>80</sup>.

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<sup>75</sup> Myungsuk Lee, “Conceptualizing the New Governance: A New Institution of Social Coordination”, Spring-03 Indiana University Papers (2003), at 7.

<sup>76</sup> Erik-Hans Klijn, “Public–Private Partnerships: deciphering meaning, message and phenomenon”, in Graeme A. Hodge, Carsten Greve, Anthony E. Boardman (eds.) *International Handbook on Public-Private Partnership*, Edward Edgar Publishing (Cheltenham, 2010), 68-80, at 73.

<sup>77</sup> Adrienne Héritier, “New Modes of Governance in Europe: Policy Making without Legislating?”, in Adrienne Héritier (ed.), *Common Goods: Reinventing European Integration Governance*, Rowman & Littlefield (Boulder, CO, 2002) 185-206, at 201.

<sup>78</sup> Laurence Lynn, Carolyn Heinrich and Carolyn Hill, “Studying Governance and Public Management: Why? How?”, in Carolyn Heinrich and Laurence Lynn, *Governance and Performance: New Perspectives*, Georgetown University Press (Washington D.C., 2000), 1-33, at 2.

<sup>79</sup> Leslie Budd, “Post-bureaucracy and reanimating public governance. A discourse and practice of continuity?”, 20(6) *International Journal of Public Sector Management* (2007), 531-47, at 533.

<sup>80</sup> James N. Rosenau and Ernst-Otto Czempiel, *Governance Without Government: Order and Change in World Politics*, Cambridge University Press (Cambridge, 1992), at 2.

What is relevant for the purposes of our analysis is that new governance points to the creation of a structure, not externally imposed, which results of an interaction of a multiplicity of governing and mutually influencing actors<sup>81</sup>. One of the leading contributors to the theorization of new governance in the European Union, Simon Hix, lays emphasis on the following interrelated characteristics<sup>82</sup>:

- the process of governing is no longer conducted exclusively by the state, but involves all social, political and administrative actors that guide, steer, control or manage society;

- the relationship between state and non-state actors in this process is polycentric and non-hierarchical and mutually dependent.

- the key governance function is regulation of social and political risk, instead of resource redistribution.

The result is a new problem-solving rather than bargaining style of decision-making opposed to the classic state-centric, command-and-control, redistributive and ideological processes of government and politics<sup>83</sup>. The uptake of new governance methods at the Union level is, at least in part, due to the permanent resistance of member states to yield administrative competencies, as member states have accepted schemes of administration in which they could intervene and shape that decision-making procedures<sup>84</sup>.

New governance assumes that no single actor –in particular, not the central governing actor– has sufficient overview to apply the particular policy instruments effectively, so decisions shall be the outcome of interacting intervention effort of all the

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<sup>81</sup> Jan Kooiman and Martijn van Vliet, “Governance and Public Management”, in Kjell Eliassen and Jan Kooiman (eds.), *Managing Public Organizations: Lessons from Contemporary European Experiences*, Sage Publications (London, 1987) 58-72, at 64.

<sup>82</sup> Simon Hix, “The Study of the European Union II: The ‘New Governance’ Agenda and its Rival”, 5(1) *Journal of European Public Policy* (1998), 342-56, at 343.

<sup>83</sup> *Ibid.*

<sup>84</sup> Støle, “Towards a Multi-Level Community...”, at 89.



involved actors<sup>85</sup>. These approaches are thus particularly adequate for the reality of how the European Union operates. Considering the mismatch between the ambitious goals and the limited capacity of the Union, the high expectations and the narrow legitimacy, new governance mechanisms appear as excellent opportunities for effective action<sup>86</sup>. Some sectors are particularly prone to this trend, like social policy<sup>87</sup>, regulatory action<sup>88</sup>, or even the mechanisms in the Council decision-making<sup>89</sup>. To some authors, a large part of the Union's administrative action can be portrayed within this new governance framework<sup>90</sup>, although the powers of government in the classic sense still remain essential even in multi-level setups<sup>91</sup>. Consequently, there is a progressive uptake of the new government vision of administrative action.

Unquestionably, there are different types of governance applicable to the European Union, and the old fashioned Community method remains one of them. Within the diffuse boundaries of the new government mechanisms, the European Union has systemic properties leading to a peculiar method that some scholars designate "network governance"<sup>92</sup>, as a sub-type of new governance pattern that is predominant in the European Union. Inasmuch as the essence of EU action is problem solving and the

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<sup>85</sup> Jan Kooiman, *Modern Governance: New Government-Society Interactions*, Sage Publications (London, 1993), at 4.

<sup>86</sup> Bukard Eberlein and Dieter Kerwer, "New Governance in the European Union: A Theoretical Perspective", 42(1) *Journal of Common Market Studies*, 121-42, at 122.

<sup>87</sup> See Claire Kilpatrick, "Working Paper: New EU Employment Governance and Constitutionalism", NewGov Project Working Paper (2006); and David M. Trubek and James S. Mosher, "New Governance, EU Employment Policy, and the European Social Model", in Christian Joerges, Yves Mény, Helen Wallace, and Joseph H. H. Weiler (eds.), *Mountain or Molehill? A Critical Appraisal of the Commission's White Paper on Governance*, Jean Monnet Working Paper No. 6/01. Both papers stress the limited legal powers of the EU in social policy and yet though a prime example of new governance mechanisms, the open method of coordination, it can achieve practical results.

<sup>88</sup> Martijn L. P. Groenleer, "Regulatory Governance in the European Union: The Political Struggle Over Committees, Agencies and Networks", in David Levi-Faur (ed.), *Handbook On The Politics Of Regulation*, Edward Elgar Publishing (Cheltenham, 2012), 548-62, at 561. This author points out that the institutionalization of the EU's regulatory space does not signify a centralization of EU regulation but rather the development of European regulatory networks.

<sup>89</sup> Fiona Hayes-Renshaw and Helen Wallace, *The Council of Ministers*, Palgrave Macmillan (Basingstoke, 2010), at 186.

<sup>90</sup> Scott and Trubek, "Mind the Gap: Law ...", at 7.

<sup>91</sup> Andrew Jordan, "The European Union: an evolving system of multi-level governance ... or government?", 29(2) *Policy & Politics* (2001), 193-208, at 201

<sup>92</sup> Beate Kohler-Koch, "Introduction: network governance in the European Union", in Rainer Eising, Beate Kohler-Koch (eds.), *The Transformation of Governance in the European Union*, Routledge (London, 1999), 3-12, at 5.



setting of policymaking in the EU is defined by highly organised social sub-systems – *i.e.* Member States–, this network governance entails that the Union has to pay tribute to the specific rationalities, assume that authority is dispersed and operate as an activator bringing together the relevant state and societal actors to make issue-specific constituencies<sup>93</sup>.

### *2.2.3.- The difficult legal assessment of the new realities*

Those theoretical descriptions of the current patterns for European Union action are still not consensually adopted by the legal scholarship, leading to the aforementioned mismatch. Gráinne de Búrca and Joanne Scott have systematised the relationship between law, as traditionally conceived, and new governance approaches as follows<sup>94</sup>:

- the gap thesis, according to which formal law is blind to the practice of governance, either because it ignores those developments or because it contest its assumptions;

- the hybridity thesis, in which law acknowledges the existence of new governance patterns, but it largely confines them to a soft law status<sup>95</sup>; and

- the transformation thesis, which argues that new governance demands a whole re-conceptualisation of law. In particular, the adaptation shall bear major consequences in terms of procedural law, which indeed is at the central part of this dissertation.

In sum, the traditional legal approach, under the most favourable assumption, finds it troublesome to adapt to the real functioning of the European Union. Any legal

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<sup>93</sup> *Ibid.*

<sup>94</sup> Gráinne de Búrca and Joanne Scott, “Introduction: New Governance, Law and Constitutionalism”, in Gráinne de Búrca and Joanne Scott (eds.) *Law and New Governance in the EU and the US*, Hart Publishing, (Oxford and Portland, OR, 2006), 1-27, at 7-16.

<sup>95</sup> There are three versions of this thesis: Baseline hybridity claims that new governance is complementary to the traditional formal forms of government, and thus the old and new can co-exist in parallel; developmental hybridity argues that new governance techniques are an instrumental means of developing and applying existing legal norms; and default hybridity proposes that traditional legal rules only apply in the absence of new governance mechanisms.

analysis of the European public administration cannot neglect this starting point. A proper conceptualization of the European public administration is not possible without the dynamic context of how it actually functions. As political scientists have long argued, European integration is fundamentally a political process<sup>96</sup>. Jurists stress out the role of law in this process<sup>97</sup>, but they should not miss the context<sup>98</sup> for our assessment, in particular at times when new governance approaches are leaving behind the traditional legal paradigms upon which the European Union administration was built.

The static picture to be framed as European public administration results from this dynamic process of integration, in which the enlargement of administrative competencies has occurred concurrently with the interwoven involvement of Member States and other actors. Hence, it should come as no surprise that lawyers do not find themselves at ease with such a blurred and legally loose concept. Notwithstanding, it is a task to be carried out, not for reasons of legal academic aesthetics, but because only with a real, accurate overview of the structural and organisational foundations is it possible to address the concept and challenges posed by the procedures resulting from this reality.

The “legal” vision of the European integration has been blamed for its isolation from the political and economic context in which it operates<sup>99</sup>. The political scientist Martin Shapiro famously criticised the legal thinking of his time for this reason. In his

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<sup>96</sup> The prominent political scientist Ernst Haas defined the European political integration as “the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states”, see Ernst B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950-57*, Stanford (Stanford University Press, 1958), at 16.

<sup>97</sup> Law in the European integration cannot be reduced to a merely instrumental role; see the often cited work; Joseph H. H. Weiler, “Community, Member States and European-Integration - Is the Law Relevant?”, 21 *Journal of Common Market Studies* (1982), 39-55.

<sup>98</sup> As Joerges pointed out, the effectiveness of a legal system is limited if viewed in isolation from the broader (political, economic) context in which it operates; see, Christian Joerges, “Taking the law seriously: on political science and the role of law in the process of integration”, 2 *European Law Journal* (1996), 105–135, at 106.

<sup>99</sup> See for instance, Harm Schepel and Rein Wesseling, “The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe”, 3(2) *European Law Journal* (1997), 165-88; and, the older paper Karl Kaiser, “L’Europe des savants. European Integration and the Social Sciences”, 4 *Journal of Common Market Studies* (1965), 36-46.

view, legal scholars conceived the European Community as a mere juristic creation and used rigid legal patterns to describe the reality of European integration<sup>100</sup>.

This work shall not conduct a legal analysis that remains confined to a self-referential theoretical level. It shall carefully examine reality and adapt legal standards to it, in order to describe it and to propose plausible legal solutions. The exercise of fitting the new reality into the old legal paradigms is to be avoided. As professor Curtin<sup>101</sup> pointed out, the Law shall not resort to a type of exercise in camouflage, and lawyers shall free themselves from the old schemes and paradigms when necessary to assess today's European Union.

Indirect administration and community method, as elegant from a legal point of view as they might appear, are clear examples of old paradigm, still visible and to a large extent, valid, but no longer sufficient. There is increasing evidence and theorisation that executive action is becoming something different, although certainly not more similar to a national administration.

### ***2.3- A European public administration thoroughly different from its national counterparts***

National public administration has evolved according to the needs of the national state whose purposes it serves<sup>102</sup>. The Western European newborn nation- states of the sixteenth century needed an organisation for the enforcement of law and order, and for the setting up a defence structure. Servants integrating such organisation were subject to the will of the king, rather than the law<sup>103</sup>.

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<sup>100</sup> Martin Shapiro, "Comparative Law and Comparative Politics", 53 *Southern California Law Review* (1980), 537-42, at 538.

<sup>101</sup> See, Deidre M. Curtin, "European Legal Integration: Paradise lost?", in Deidre M. Curtin (ed.), *European Integration and Law*, Intersentia (Antwerp, 2006), 1-54, at 53. She criticizes for example "insisting stubbornly on a non-delegation doctrine (as in the *Meroni* case on agencies) and construing comitology committees as 'part of' the Commission (the *Rothmans* case) despite clear evidence that this is not the case"

<sup>102</sup> Thornhill and van Dijk, "Public Administration Theory...", at 99.

<sup>103</sup> Françoise Dreyfus, *L'invention de la bureaucratie. Servir l'État en France, en Grande Bretagne et aux États Unis (XVIII<sup>ème</sup> - XX<sup>ème</sup> siècle)*, Éditions la Découverte (Paris, 2000), at 23.

Until the eighteenth Century nothing resembling an administrative structure in the modern sense of the word actually existed<sup>104</sup>. The need to administrative expertise grew then, due to the increasing functions of the state and the extending hold of European countries over other continents and people, so that larger numbers of experts were required<sup>105</sup>. The key transformation was the abandonment of the patrimonial conception of the state<sup>106</sup> and the invention of the politics/administration dichotomy<sup>107</sup>. It was then that public administration began to be considered either the virtuous sister or the dull servant of politics<sup>108</sup> at the same time that a functional distinction arose between the politician and the professional servant<sup>109</sup>, the latter being considered experts representing the general interest<sup>110</sup>.

France presents a clear example of this evolution. The nature of the state was depersonalized by the French Revolution, so the state became the machinery set up by the nation for its own government and to organise its public services. Consequently, the allegiance of public officials changed from the monarch to the nation<sup>111</sup>.

The first academic studies on the public administration can be found in France and Germany. In France, in particular, the pioneer on the analysis of what was firstly called *science de la police* was Charles-Jean Bonin. In his work *Principes d'administration publique* published in 1812, he put the focus on the relations between

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<sup>104</sup> Jose Antonio Maravall, "Estado moderno y mentalidad social (siglos XV a XVII), I *Revista de Occidente* (1972), 457-525; cited in Fabio Rugge, "Administrative Traditions in Western Europe", in Guy Peters and Jon Pierre (eds.), *Handbook of Public Administration*, Sage Publications (Thousand Oaks, CA, 2003), 177-91, at 178.

<sup>105</sup> Thornhill and van Dijk, "Public Administration Theory...", at 99.

<sup>106</sup> Ferrel Heady, *Public administration: a comparative perspective*, Marcel Dekker (New York, 1991), at 184.

<sup>107</sup> Edgar Norman Gladden, *A History of Public Administration. Volume II. From the Eleventh Century to the Present Day*, Frank Cass (London, 1972), at 358.

<sup>108</sup> Rugge, "Administrative Traditions...", at 179.

<sup>109</sup> *Ibid.*

<sup>110</sup> Jamil Jreisat, *Globalism and Comparative Public Administration*, CRC Press (Boca Raton, FL, 2012), at 170.

<sup>111</sup> François Burdeau, *Histoire de l'administration française du 18e au 20e siècle*, Montchrestien (Paris, 1999), at 73.

the administration and the citizens<sup>112</sup>. The further theorisation on public administration came subsequently in the late nineteenth century, thanks to the works of von Stein, in Europe, and Wilson, in America. Both considered that the study of public administration was an autonomous discipline<sup>113</sup>.

The trend towards the *depolitization* of public administration had its climax with the assimilation of public administration under the notion of bureaucracy by Max Weber. To Weber, public administration was the apolitical tool of government<sup>114</sup>. Weber's characterisation of bureaucracy remained the centre of gravity for the study of public administration for much of the twentieth Century<sup>115</sup>. In his description of public bureaucracies, he highlighted the following features<sup>116</sup>: a) a mission defined by top officials; b) authority granted from top to bottom; c) fixed jurisdictions within the organisation, with the scope of work defined by rules; and d) management by set rules, career experts, and written documents.

This classic design has evolved in most national administrations in European countries<sup>117</sup>. The Weberian conception of the impartial bureaucrat, administering State authority in the interest of the community is the symbol of the early twentieth century European nation-state, when public administration was a highly elaborated hierarchy of authority superimposed upon a highly elaborated division of labour<sup>118</sup>. In France, the *école classique* of professors Chardon and Fayol also stressed the distinction between

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<sup>112</sup> Charles-Jean-Baptiste Bonnin, *Principes d'administration publique*, Renaudière (Paris, 1812), cited by Jean Mercier, *L'administration publique: de l'école classique au nouveau management public*, Les presses de l'université de Laval (Saint-Nicolas, Canada, 2007), at 37.

<sup>113</sup> Thornhill and van Dijk, "Public Administration Theory...", at 99.

<sup>114</sup> Max Weber, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*. Mohr Siebeck (Tübingen, 1976), 128; cited in Wolfgang Seibel, "Beyond Bureaucracy-Public Administration as Political Integrator and Non-Weberian Thought in Germany", 70 *Public Administration Review* (2010), 719-30, at 719.

<sup>115</sup> Jay M. Shafritz and Albert C. Hyde, "Bureaucracy. 1922. Max Weber", in Jay M. Shafritz and Albert C. Hyde, *Classics of Public Administration*, Cengage Learning (Stamford, CN, 2012), 28-33.

<sup>116</sup> A useful summary of Max Weber's works can be found in Don Kettl, "Public Bureaucracies", in Rod Rhodes, Sarah Binder and Ben Rockman *The Oxford Handbook of Political Institutions*, Oxford University Press (Oxford, 2006), 366-84.

<sup>117</sup> Christopher Pollitt and Geert Bouckaert, *Public Management Reform, A Comparative Analysis*, Oxford University Press (Oxford, 2004), at 62.

<sup>118</sup> Heady, *Public administration...*, at 91.

the political power and the administrative functions, which shall work autonomously from each other<sup>119</sup>.

The most remarkable trend in the evolution of public administration in the recent decades however is the overflow of the traditional limits of policy implementation, and the enlargement to the activities of public administrations to public formulation<sup>120</sup>. This phenomenon is altering substantially the classical, Weberian features of public administration.

Even though outdated in some respects at the present time, the original design of a Weberian administration is still visible in most European national public administrations<sup>121</sup>. Although the topic of administrative reform aimed at departing from the rigidities of the Weberian model has had prominent place in the agendas of many European countries<sup>122</sup>, many national administrations are still predominantly hierarchical organisations relatively closed to external influences<sup>123</sup>.

The early European Commission and its predecessor, the High Authority of the ECSC, were largely inspired in the hierarchical continental model. Institutional choices of the design of the Commission date back to the foundation of the Community in the decade of 1950, and the French model of administration was the main source of inspiration in the design by Jean Monnet<sup>124</sup>. This is true even when the Commission in its current structure was only established in 1967, it resulted from three entities corresponding to each of the three Communities.

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<sup>119</sup> Mercier, *L'administration publique: de l'école classique...*, at 39.

<sup>120</sup> Robert B. Denhardt, *Theories of Public Organisation*, Cengage Learning, (Stamford, CN, 2008), at 103.

<sup>121</sup> Simon Hix, "The study of the European Community: The challenge to comparative politics", 17 *West European Politics* (1994), 1-30, at 2.

<sup>122</sup> Michalopoulos Nikos, "Trends of Administrative Reform in Europe: towards administrative convergence?", *First Regional Interactional Conference of the International Institute of Administrative Sciences*, University of Bologna, (2000) 39-53, at 39.

<sup>123</sup> Schmidt, "Federalism and State Governance...", at 349. This is particularly the case in France and in other countries of administrative law tradition, like Spain and Italy.

<sup>124</sup> Tim Balint, Michael Bauer and Christoph Knill, "Bureaucratic change in the European administrative space: The case of the European Commission", 31(4) *West European Politics* (2008), 43-81, at 45.

It has been said about the Commission administrative structure that it is a “combination of Napoleonic and Germanic values, with the former putting a premium on hierarchy, codification, intellectual rationality, centralization and the creation of an *esprit de corps* among the *élite* of officials, and the latter stressing employee participation via works councils and the autonomy of each Commissioner”<sup>125</sup>. There are various aspects where the Napoleonic model has been especially visible.

The civil service system is one of those elements. The career-system of the Commission was designed with the essential characteristics of the *fonction publique*<sup>126</sup>, that is, formal recruitment procedures and a statutory system of remuneration and other rights<sup>127</sup>. This system is opposed to the British and Scandinavian position-system of civil service, that did have an influence after the subsequent enlargements, by introducing certain flexibility in the recruitment process and, particularly in the agencies, limiting the staff with a statutory regime and hiring employees with a contractual relationship<sup>128</sup>.

Internal hierarchy in the Commission and the other institutions, based on a system of grades, is also a heritage of the French model, as it is the link existing between the political positions –Commissioners or Ministers– and the administrative bodies through a cabinet that ensures the political control. Politization in Anglo-Saxon models takes place differently<sup>129</sup>. Hence, from a structural point of view, the public administration of the European Union was designed and still reflects, at its core, the Napoleonic model.

Finally, the provisions in the Treaties on judicial review of the acts of the Communities were also clearly based on French legislation on the administrative

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<sup>125</sup> Roger Levy, "Critical success factors in public management reform: the case of the European Commission", 69(4) *International Review of Administrative Sciences*, (2003), 553-66, at 556.

<sup>126</sup> Stevens, "Les hauts fonctionnaires de l'Union Européenne...", at 12.

<sup>127</sup> Danielle Bossaert, Christoph Demmke, Koen Nomden, Robert Polet, and Astrid Auer, *Civil Services in the Europe of Fifteen: Trends and New Developments*, EIPA, (Maastricht, 2001).

<sup>128</sup> *Ibid.*.

<sup>129</sup> Guy Peters and Jon Pierre, "Politization of the civil service: concepts, causes consequences", in Guy Peters and Jon Pierre (eds.), *Politization of the Civil Service in Comparative Perspective. The quest for control*, Routledge (London, 2004), 1-13, at 10.



jurisdiction<sup>130</sup>, notoriously with regards to the grounds of review for the acts of the public administration<sup>131</sup>.

The relative shift in the model of administration can not only be explained by the enlargements, notably that of 1973, but also, and perhaps to a larger extent, by the progressive increasing demands for a more efficient Commission during the 1990's<sup>132</sup>. In the 2000's, administrative reform ranked high among the Commission's priorities, and Vice President of the Commission Neil Kinnock notoriously launched a number of reforms contained in a White Paper<sup>133</sup> that, once implemented, brought about the uptake of some 'new public management' techniques and practices and, more generally, a more flexible approach to the organisation and procedures. Afterwards, the proliferation of agencies and a new White Paper on Governance<sup>134</sup> added up to the trend towards more flexibility<sup>135</sup>. However, the traits of the original system based on the French model in the abovementioned aspects remain visible<sup>136</sup>.

Leaving the structure aside, from a functional perspective, the public administration of the European Communities has always been substantially different from its national counterparts. Since the beginning, the European level of decision making has been more involved in policy formulation than policy implementation, as was exemplified by the scheme of indirect administration. It stems from the fact that from the start the administrative bodies of the EC were more facilitators and designers than executors. This also has a consequence from a structural point of view, as a

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<sup>130</sup> Roberto Caranta, *Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection*, in Roberto Caranta and Anna Gerbrandy (eds), *Traditions and Change in European Administrative Law*, Europa Law Publishing (Groningen, 2011), 15-62, at 21.

<sup>131</sup> The most notable example is the ground of *détournement de pouvoir* or misuse of powers, which had its origin in the French administrative jurisdiction.

<sup>132</sup> The loss of credibility of the Commission which had its climax in the resignation of the Santer Commission in 1999; see Antonis Ellinas and Ezra Suleiman, "Reforming the Commission: Has the pendulum swung too far?", in European Union Studies Association (EUSA), Biennial Conference, May 17-19, 2007, Montreal, Canada, at 21.

<sup>133</sup> White paper on Reforming the Commission, COM(2000) 200, March 2000, available at [http://ec.europa.eu/governance/white\\_paper/index\\_en.htm](http://ec.europa.eu/governance/white_paper/index_en.htm)

<sup>134</sup> White paper on European Governance COM (2001) 428 final, available at [http://ec.europa.eu/governance/white\\_paper/index\\_en.htm](http://ec.europa.eu/governance/white_paper/index_en.htm)

<sup>135</sup> Stevens, "Les hauts fonctionnaires de l'Union Européenne...", at 23.

<sup>136</sup> Henri Oberdorff, "La fonction publique de l'Union européenne", in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère, (eds.), *Droit administratif européen*, Bruylant (Brussels, 2007), 213-31, at 214.



relevant feature of the EU administrative bodies is that administrative responsibility is shared<sup>137</sup>, in a way that they heavily rely on the support from the national public administrations.

Today, many of the characteristic of the EU administration are rather drawn by contrast to the Weberian classic model:

- a mission is determined by cooperation, which usually involves other administrations;
- hierarchical order is hollowed out by an increasingly joint administration; and
- rules are understood in the context of the procedural nature of administrative law<sup>138</sup>.

For some theorists of European Union political science, particularly of an Anglo-saxon academic background, like professor Nugent, there is no use in analysing modern democratic governance in the EU in the light of old Weberian postulates<sup>139</sup>. While it is true that the embryo of a European administration was not born as a national administration, the heritage of the classic postulates, very present in the early configuration of the Commission, is still discernible in the public administration of the Union.

This can be illustrated by the reasoning of the Court of Justice in early cases. A clear example is the *von Lachmüller* case<sup>140</sup>. The Court was questioned on the validity of the dismissal of several translators employed by the Commission before the Staff regulations were approved. Although there is no specific legal framework for the labour

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<sup>137</sup> See the conclusions of the work, Eva Heidbreder, "Structuring the European Administrative Space", KFG Working Papers, 5/2009, at 25.

<sup>138</sup> Eva Heidbreder, "Bureaucrats in Multilevel Governance – How to Evaluate the Effect of 'Governance Beyond' on "Administration Within" the State?", Paper presented at the EGPA Conference EU Administration and Multilevel Governance (Bucharest 7-9 September 2011), at 4, available at <http://egpa-conference2011.org/documents/PSG14/HEIDBREder.pdf>.

<sup>139</sup> Neill Nugent, *Government and Politics of the European Union*, Palgrave Macmillan (New York, 4th Ed., 2003), 512.

<sup>140</sup> Case 43/59, *von Lachmüller / Commission*, Judgment of 15 July 1960, [1960] ECR 463.

relationships of the workers of the Commission at the moment, the Court of Justice analysed whether the employment contracts fall with public law or private law<sup>141</sup>, hence it brought up the traditional *summa divisio iuris* developed in French law in particular<sup>142</sup>, and in continental European legal systems more generally, but not existing in English law<sup>143</sup>, where only recently the division has been studied<sup>144</sup>. This early case-law understands that the essential element for a distinction it considers critical –public and private law– is, as in the classical formulation, its legal creation as a public person and the public functions it exercises. Specifically, it states that:

“[t]he European Economic Community, acting within the powers conferred on it by the Treaty, has legal personality as laid down by Article 210 of the Treaty. That personality is one of public law by virtue of the powers and duties appropriate to it. Consequently, the contracts at issue were concluded by a person at public law.”

This leads to the conclusion that there is a conception, even if not very elaborate, of a public administration in the Weberian sense, as understood by the French legal tradition. However, in comparison with national administrations of Member States, the EU public administration has evolved much faster from a hierarchical bureaucracy towards a more open organisation, until the present stage where the essence of an EU administration lies in cooperation –often not even a clearly structured cooperation– and not in hierarchy.

Nonetheless, the traits of this classical administration are still so deeply embedded in the very notion of public administration that the term EU administration has rarely been used in academic literature until very recently. Terms which evoke a more open, less autonomous notion, such as European Administrative Space or

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<sup>141</sup> *Ibid.* at 472.

<sup>142</sup> Alexandre Weill et François Terré, *Droit civil. Introduction Générale*, Dalloz (Paris, 1973), at 31.

<sup>143</sup> In the common law tradition, private law referred to the acts and regulations addressed not to the general public or abstract categories of persons, but certain individuals; thus being prohibited, for example, in several State constitutions of the United States of America. See Lon L. Fuller, *Anatomy of the Law*, Greenwood Press (Westport, CN, 1976), at 92.

<sup>144</sup> For a comparison, see Jean-Bernard Auby and Mark Freedland, *La distinction du droit public et du droit privé. Regards français et britanniques*, Panthéon-Assas Paris II (Paris, 2004).

European Executive Order have been used in academic literature instead, until the formal recognition of a “European administration” in the Treaty of Lisbon.

Apart from these distinct structural elements and the dissimilar functions that the Union’s administration has pursued, there is an additional feature that further characterises the European Union as an administrative actor: pluralism. When a policy is formulated at the Union level many more stakeholders have an actual say than at the national level. While this is particularly true for the intervention of member states, it is not limited to it. National policy formulation is rather autonomous, more closed to interest influence and more conflictual, resulting in more political decisions taken at the top<sup>145</sup>.

By contrast, the EU pluralist policy-making processes are more open to outside interests, more flexible in implementation and more consensual in style, resulting in less political decisions which are less often taken at the top<sup>146</sup>. These features have tangible consequences not only for the structure of an EU administration, but also at the level of the type of procedures that channel its decision-making.

The original design of the public administration of the Union was once visibly inspired in the Napoleonic model. However, resulting from a number of changes, it has in many ways departed from this model. Additionally, the pluralism and openness of the EU public administration render it different from member state national public administrations, where often traditional characteristics of the Weberian model still play a relevant role. The permeability of the EU public administration lies not only in its need for external cooperation, but also in the fact that it is a notion that is constantly in flux and it has responded to demands for change more quickly than national administrations. Indeed, this results from the rich and complex evolution of European integration.

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<sup>145</sup> It would be a mistake to consider that all member states’ public administration follow an identical pattern in terms of their pluralism in policy formulation. France is the prime example of a closed statist pattern, but Britain, Spain, and Italy can also be included in this statist group. Scandinavian countries, the Netherlands, Germany, and Austria have a more corporatist pattern where certain societal interests, mainly business and unions, participate in policy formulation. Even in these cases, the degree of openness is limited. See Schmidt, “Federalism and State Governance...”, at 349.

<sup>146</sup> *Ibid.* at 348.

#### ***2.4.- The impact of the European integration process in the European public administration***

A look at some aspects of the European integration may also lead to some relevant conclusions. As previously argued, the conceptualisation of the European public administration shall be aware that its characteristics are recent, dynamic and result from a progressive evolution. The dynamism that characterises the European integration has a direct impact in the EU administration, whose legal framework has substantially varied over time<sup>147</sup>.

In the early times of European integration many of the scholars that approached the study of European integration did so under the light of federal theories. A large part of the original features of the early Communities, particularly so in the ECSC<sup>148</sup>, could be explained under the federalist postulates. Considering that federalism is both a structure and a process<sup>149</sup>, the initial institutional setup and the Treaty proclamations were consistent with the essential federal notion that the integrating entities “must desire to be united, but not to be unitary”<sup>150</sup>. The schemes of indirect execution could be explained according to the rationale of federalism and valid analogies could be drawn with the federation of the United States of America<sup>151</sup>, and how it developed in spite of the original resistance of Member States<sup>152</sup>. Moreover, once the Court of Justice

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<sup>147</sup> Jean-Paul Jacqué, *Droit Institutionnel de l'Union Européenne*, Dalloz-Sirey, (Paris, 2010), at 21-31. This author describes the dynamism of the EU and the permanent institutional change throughout the European integration process. See also in a similar vein, Paul Craig, “Institutions, Power and Institutional Balance”, in Paul Craig and Gráinne De Búrca, *The Evolution of EU Law*, Oxford University Press (Oxford, 2011), 41-84.

<sup>148</sup> Some years later, when the EEC and EURATOM Treaties were signed, the large expansion of fields affected by the powers of the Institutions happened at the expense of doing away with some of the federal traits of the ECSC in the two new Communities.

<sup>149</sup> Elazar, “Exploring federalism”, 67. On the dynamic perspective of federalism, *i.e.* as a process, see Lenaerts, “Federalism: Essential Concepts...”, at 798.

<sup>150</sup> Kenneth Clinton Wheare, *Federal Government*, Oxford University Press (Oxford, 1964), at 36.

<sup>151</sup> Mark Tushnet, “Conclusion”, in Mark Tushnet (ed.), *Comparative Constitutional Federalism. Europe and America*, Greenwood Press (New York, 1990), 139-58, at 139.

<sup>152</sup> See for more details on how the resultance of yielding powers to the central level was similar in both the United States and Europe but was, at some point, overcome, in Leslie Friedman Goldstein, “The Member State resistance paradox: American Union (1790-1860) versus European Community (1958-1992)”, in Leslie Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context*, John Hopkins University Press (Baltimore, MD, 2001), 14-62.

declared that the Treaties constitute the constitutional charter of the Community<sup>153</sup>, there was no obstacle to fit it in the modern conception of federalism whose core idea is that the division of powers between the centre and the parts is established constitutionally<sup>154</sup>.

However, for many theorists of European integration, federalist approaches failed to fully capture the unique nature of European integration<sup>155</sup>. Neo-functionalism was also a salient theory in the early development of the Communities, and it focused more on the dynamic aspect of integration. Haas took note of Monnet's pragmatic approach to the building of Europe<sup>156</sup> and developed the key concept of 'spill-over'. Agreement on integration in one economic area shall over time cause other policy-areas to integrate too, in order to fully achieve the integration of the first area. On the other hand, Haas understood European integration as a process whereby political actors in distinct national setting would change loyalties, expectations and political activities to a new political community, superimposed over member states<sup>157</sup>.

Those two theories could be understood as compatible<sup>158</sup>, but when scrutinised against the reality of European integration in the following years they fell short of explaining it. In truth, member states as the 'masters of the treaties' were steering the whole process to a larger extent than the previous theories had predicted, in particular at moments like the institutional impasse of the *crise de la chaise vide*. The key institution,

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<sup>153</sup> This declaration was first explicit in the seminal judgement in CJEC, Case 294/83 *Les Verts / Parliament*, judgement of 23 April 1986, [1986] ECR 1339, paragraph 23, according to which "EEC is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty". This declaration was reiterated later in its CJEC, Opinion 1/91 of 14 December 1991, [1991] ECR 6102, "the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law". But, for many, the constitutional character of primary law could be inferred from the earlier ruling in CJEC, Case 26/62 *Van Gend en Loos / Netherlands Inland Revenue Administration*, judgement of 5 February 1963 [1963] ECR (English special edition) 1, where it already stated that hat the Community constitutes a new legal order. See Gil Carlos Rodríguez Iglesias, "La constitucionalización de la Unión Europea", 16 *Revista de Derecho Comunitario Europeo* (2003), 893-96.

<sup>154</sup> David H. McKay, *Federalism and European Union: A Political Economy Perspective*, Oxford University Press (Oxford, 1999), at 16.

<sup>155</sup> Dosenrode, "Federalism Theory and Neo-Functionalism...", at 4.

<sup>156</sup> Best illustrated by Schuman declaration that "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity".

<sup>157</sup> Haas, *The Uniting of Europe...*, 16.

<sup>158</sup> Dosenrode, "Federalism Theory and Neo-Functionalism...", at 25.

the Council of Ministers, appeared to be nothing more than ‘intergovernmental negotiating forum’<sup>159</sup>. Largely influenced by the background in realist, American-based international relations theory, Professor Hoffmann put forward a thesis of intergovernmentalism. He reasoned that integration was possible in technical functional sectors where national interests coincided, but otherwise national governments remained not only the sole sovereign entities, but also the ones that had the monopoly of political legitimacy, as they were the only democratically elected actors<sup>160</sup>.

A later reformulation of this theory (liberal intergovernmentalism) admitted that national leaders had agreed to give up some sovereignty, but only as it reinforced their power from the internal point of view, as they undermined potential domestic opposition by reaching bargains in Brussels and presenting results as European decisions<sup>161</sup>. However, the European Community's executive –the Commission– could not be considered a supranational source of change, only member States had that power.

But again the general assumptions of this theory proved inconsistent with the subsequent developments. The ambitious agenda of the Santer Commission and the Treaty of Maastricht placed the federalist rhetoric in vogue once again<sup>162</sup>. As a result, from the early 1990's many publications were responses to intergovernmentalist hypotheses<sup>163</sup>. By then, European integration had already developed as an increasingly complex pluralistic process where many actors, not only member State governments, played a role. Increasingly, the European Union required the assembly and coordination of a dense network of experts<sup>164</sup>.

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<sup>159</sup> Andrew Duff, “Maastricht and Beyond: Building a European Union”, Routledge (London, 1994), 192.

<sup>160</sup> Stanley Hoffmann, “Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe”, in Stanley Hoffmann, *The European Sisyphus: Essays on Europe, 1964-1994*, Westview Press (London, 1995), 862-915.

<sup>161</sup> Andrew Moravcsik, “Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach”, 31 *Journal of Common Market Studies* (1993), 473-524, at 515.

<sup>162</sup> Michael Burgess, “Introduction: Federalism and Building the European Union”, in 26(4) *Publius: The Journal of Federalism* (1996), 1-16, at 4; and McKay, *Federalism and European Union...*, at 19.

<sup>163</sup> Paul Pierson, “The Path to European Integration : A Historical Institutional Analysis”, 29(2) *Comparative Political Studies* (1996), 123-63, at 124.

<sup>164</sup> *Ibid.* 133.

Multilevel governance approaches started to develop in order to explain this new complex reality<sup>165</sup>. The emerging picture was that of a polity with multiple, interlocked arenas for political contest<sup>166</sup>. Proponents of multilevel governance analysis gave up the grand old prospect of finding a comprehensive single theory for European integration, and admitted that it is a polity creating process in which authority and policy-making influences are shared across multiple levels of government. While national governments remain important pieces of the European puzzle, they no longer monopolize European-level policy making<sup>167</sup>.

Recent middle-range theories stress the diversity and segmentation of the EU<sup>168</sup> and are more apt for giving intellectual theorisation to the current situation of the EU. In particular, the policy networks approach assumes three basic points that actually apply to the European Union functioning: firstly, governance is frequently non-hierarchical; secondly, policy process must be disaggregated; and lastly, governments are responsible for governance, but other actors might play an important role<sup>169</sup>. Both national and supranational interests play a big role in the European decision process and they are different in each area of action, and they may appear interwoven as it happens in composite procedures. But these two are not the only relevant interests. In fact, many of the EU policy outcomes reflect purely technocratic rationality<sup>170</sup>.

The lessons to be learnt from this quick panorama of grand integration theories is that they have all aimed at explaining the nature of the European Union with a consistent theorisation, but they have all failed to do so because the EU and the

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<sup>165</sup> Andrew Smith, "Multilevel Governance: What it is and how it can be explained", in Guy Peters and Jon Pierre (eds.), *Handbook of Public Administration*, Sage Publications (Thousand Oaks, CA, 2003), 619-28.

<sup>166</sup> Liesbet Hooghe, "The European Union and multi-level governance in practice. Patterns of subnational involvement: expansion, divergence, complexity", in *Fourth Biennial International Conference of the European Community Studies Association*. Charleston (1995), at 3, available at [http://aei.pitt.edu/7298/1/002958\\_1.pdf](http://aei.pitt.edu/7298/1/002958_1.pdf)

<sup>167</sup> Lisbet Hooghe and Gary Marks, *Multi-Level Governance and European Integration*, Rowman & Littlefield (London, 2001), 3.

<sup>168</sup> Andrew Jordan, "The European Union: an evolving ...", at 194.

<sup>169</sup> John Peterson, "Policy Networks", in Anje Wiener and Thomas Diez (eds.), *European Integration Theory*, Oxford University Press (Oxford, 2<sup>nd</sup> ed., 2009), 105-24, at 105.

<sup>170</sup> Peterson, "Policy Networks ...", at 109.



processes of European integration are just too complex to be captured by a single theoretical prospectus<sup>171</sup>.

The European Union and European integration has functioned differently at different points of time, therefore theories have in truth described a particular moment of integration rather than integration as a whole<sup>172</sup>. The initially modest and largely technocratic achievements of the European Communities seemed less significant than the potential that they represented for the gradual integration of the countries of Western Europe into something else, a supranational polity. Nowadays, the whole focus of political scientists remains in the European Union<sup>173</sup>. Hence, the focal point of those theories has shifted over time. In the 1960s the centre of attention was on European integration, while in the 1980s analysis of governance received more attention and finally in the 1990s the focus has moved to constructing the EU<sup>174</sup>.

The debate taking place among the so called grand theories emphasised whether the supranational or the international element of European integration was prevalent and, with that in mind, authors have attempted to create an intellectual structure where the European Union could perfectly fit. The EU administration would then be simply characterised either as the federal higher authority of the Union or the general secretariat providing the institutional playing field for Member States to gather and reach agreements.

It has not been the case. However, the theories can offer some explanation if seen as pertaining to specific phases and issue-areas of European Integration<sup>175</sup>. But, beyond that conclusion, grand theories are unfit for describing the

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<sup>171</sup> Ben Rosamond, *Theories of European Integration*, Palgrave Macmillan (Basingstoke, 2000), at 7.

<sup>172</sup> *Ibid.* at 98.

<sup>173</sup> Mark A. Pollack, "Theorizing the European Union: International Organization, Domestic Polity, or Experiment in New Governance?", *Annual Review of Political Science* (2005), 358-59.

<sup>174</sup> Thomas Diez and Anje Wiener, "Introducing the mosaic of integration theory", in Anje Wiener and Thomas Diez (ed.), *European Integration Theory* Oxford University Press (Oxford, 2009), 1-24, at 7.

<sup>175</sup> Fedor Meerts, "Explaining European Integration: The Merits and Shortcoming of Integration Theory", available at <http://www.e-ir.info/2008/04/20/explaining-european-integration-the-merits-and-shortcomings-of-integration-theory/>



uniqueness of the EU<sup>176</sup>, even more so today than some years ago. Different levels of EU decision making follow different rationales, so a single theory cannot explain the actual functioning of the EU<sup>177</sup>.

The evolution shows that European integration is more complex than a few abstract, comprehensive postulates can achieve to describe. This has relevant consequences for a conceptualisation of the EU public administration, as it entails further intricacy in its nature and more unclear patterns in its functioning. A simpler federal, or even intergovernmental, scheme of European integration would place the EU public administration in a more discernible position, incardinated in the executive power. But this is not the real functioning of the Union. As middle-range approaches have argued, not a single pattern is fit for describing all the areas of EU action. Not even within administrative action a single pattern is fully explanatory. The assumption that multilevel governance schemes are more and more frequent does not contribute much to a consistent theorisation either. They put emphasis on a major feature, but this is not sufficient for the conceptualisation needed.

The evolution of integration does lead to a stronger argument for the existence of European public administration, but it also presents a major conceptual challenge. If public administration is part of the executive branch of a State, and the EU is still far from reaching the quality of a 'State', how can it have a true public administration? This essential query will be assessed in section 2.6, but there are novelties introduced by the Treaty of Lisbon that bring about new elements for the discussion.

## ***2.5.- The European public administration in the Treaty of Lisbon***

Legal scholarship has understandably developed a large analysis of the consequences of the new primary law provisions that, at last, formally support the

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<sup>176</sup> In a 1972 essay Donald Puchala described the panorama of integration theories as a group of men touching an elephant, each feeling a different part of the elephant and describing a different animal. See Donald Puchala, "Of blind men, elephants and international integration", 10 *Journal of Common Market Studies* (1972), 267-284.

<sup>177</sup> Elisabeth Bomberg and John Peterson, *Decision Making in the European Union*, Palgrave Macmillan (Basingstoke, 1999), 4.

existence of a European public administration and even provide constitutional law foundations for the subject of European administrative law<sup>178</sup>.

*2.5.1.- An open, efficient and independent European administration as an objective in the Treaties. Article 298(2) TFEU*

The Treaty of Lisbon, like the Constitutional Treaty<sup>179</sup>, takes a long awaited step and enshrines the term “European administration” in primary law. Hence, whatever doubts might have been raised about the very existence of a true European administration, they have faded away since the entry into force of the Treaty of Lisbon. Article 298(1) TFEU reads:

“In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.”

While this provision had no precedents in the Treaties, allusions to an administration of the European Communities could be found not only in secondary law –the staff regulation<sup>180</sup> and the former financial regulation<sup>181</sup>, for example–, but also in primary law provisions. The clearest example is article 24(1) of the Merger Treaty of 1965<sup>182</sup> which stated, speaking of the officials and other servants of the three

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<sup>178</sup> Eva Nieto Garrido, “Disposiciones pertinentes del Tratado de Lisboa sobre Derecho Administrativo Europeo”, in Mercedes Fuertes López (ed.), *Un Procedimiento Administrativo para Europa*, Aranzadi (Pamplona, 2012), 53-96, at 54.

<sup>179</sup> Article III-398(1) CT. It had identical wording as current article 298(1) TFEU.

<sup>180</sup> Council Regulation (EEC, Euratom, ECSC) n° 259/68 of 29 February 1968, on the staff regulations of officials and the conditions of employment of other servants of the European Communities (OJ 1968 L 56, 1). The staff regulation refers to the administration meaning the organisation of the Institutions in several provisions. For example, articles 26, 85 and 126.

<sup>181</sup> Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L356, 1). In particular, in Title X.

<sup>182</sup> Treaty establishing a Single Council and a Single Commission of the European Communities, signed in Brussels in 8 April 1965. Article 24(1): “The officials and other servants of the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community shall, at the date of entry into force of this Treaty, become officials and other servants of the European Communities and form part of the single administration of those Communities.” See Tomás de la Cuadra-Salcedo, “Acto administrativo comunitario”, in Luciano Parejo Alfonso, Tomás de la Cuadra-Salcedo, Ángel Manuel Moreno Molina, and Antonio Estella de Noriega, *Manual de Derecho Administrativo Comunitario*, Editorial Centro de Estudios Ramón Areces (Madrid, 2000), 193-228, at 195.

Communities, that they will form part of the single “administration” of those Communities. Perhaps strikingly, the Commission spoke openly of a European administration in its White Paper on Reforming the Commission<sup>183</sup>.

Most administrative law scholars have welcomed this provision as the Lisbon Treaty introduces clarity to European administrative law and apparent legal foundations to the institutional structure of the Union<sup>184</sup>. This provision is arguably far from clear and univocal, and there is an exercise of interpretation to be made. Two questions, in particular, appear of particular relevance.

The first question is what constitutes the innovative element that the Treaty of Lisbon introduces; *i.e.* what it does with respect to this ‘European administration’. Does it create it? Does it recognise it formally? Does it just characterise it as open, efficient and independent? The second question is what it means by ‘European administration’. Is it the depolitised machinery of the executive power? Or is it simply the administrative apparatus of the whole of the institutions, agencies and bodies of the Union?

When it comes to the first question, it appears from the wording of the Treaty that it does not create something new, nor does it appear to enhance its status. It seems like it takes for granted that there is a European administration, and what it adds is *how* this public administration shall be. There is no creation of a ‘European administration’ because the Union’s legislator had already used the term administration in miscellaneous secondary law provisions<sup>185</sup>. What is more, even in primary law provision the nomenclature existed<sup>186</sup>.

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<sup>183</sup> Commission’s White Paper on Reforming the Commission COM(2000) 200 final/2, available at [http://aei.pitt.edu/1189/1/reform\\_commission\\_pt\\_1\\_COM\\_2000\\_200.pdf](http://aei.pitt.edu/1189/1/reform_commission_pt_1_COM_2000_200.pdf). See for instance, at page 3 “we want the Commission to have a public administration that excels...”; at page 25 “the objective ... is to ensure that the Commission has an administration where the highest standards of performance, integrity and service prevail”

<sup>184</sup> Eva Nieto Garrido, “Possible Developments of Article 298 TFEU. Towards an Open, Efficient and Independent European Administration”, 18(2) *European Public Law* (2012), 373-97; and Jürgen Schwarze, “European Administrative Law in the Light of the Treaty of Lisbon”, 18(2) *European Public Law* (2012), 285-304.

<sup>185</sup> See above notes 180 and 181.

<sup>186</sup> See above note 182.

The triple characterisation, although it has significant legal value, is not entirely new. Transparency and openness were already imperative to the Union's authorities by virtue of several regulations and even primary law provisions<sup>187</sup>. Efficiency, from an economic point of view was also specified in the financial regulation<sup>188</sup>. All the three features could be deducted from the rights recognised in articles 41 and 42 ChFR<sup>189</sup> although, it is true, they did not have a binding character specially until the entry into force of the Treaty of Lisbon. The main legal effect of this provision, as acknowledged by some commentators, is the establishment of a legal basis for codification of European administrative procedures<sup>190</sup>, which is in itself a major innovation with critical consequences for the purposes of this work.

When it comes to the second question, the meaning of the 'European administration' that the Treaty of Lisbon enshrines is still more important from our perspective. Some authors have underlined that, after reading that provision one would not have a clear idea of what European administration exactly is<sup>191</sup>.

In order to decipher the meaning of this European administration, a short look at the historical background should be illuminating. The continental tradition of public administration, heir to the Napoleonic formulation of the *Administration Publique*, embeds public administration in the executive power, being the non-political institutional setup for policy implementation, as opposed to the political government. Legislative and judicial powers are served by smaller administrations, but these are not *stricto sensu* public administration.

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<sup>187</sup> The paramount example is the Regulation 1049/2001 of the European Parliament and of the Council, of 30 May 2001, regarding public access to European Parliament, Council and Commission documents procedures (OJ 2001 L 145, 43-48). Other examples of the requirement of an open administration can be found the Open method of coordination (articles 148-150 TFEU) as well as the citizens initiative (article 11(4) TEU and Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (OJ 2011 L 65, 1-22)). See further Joana Mendes, *Participation in EU Rule-making: A Rights-Based Approach*, Oxford University Press (Oxford, 2011), at 139.

<sup>188</sup> Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, 1-97), now repealed.

<sup>189</sup> See in detail in section 2.5.4.

<sup>190</sup> Found in Article 298 TFEU, see in more detail in section 3.4.5.

<sup>191</sup> Hofmann, Rowe and Türk, *Administrative Law and Policy ...*, at 171.

On the other hand, a *lato senso* approach to the concept of public administration would lead, in a more lax interpretation, to any public entity that administers, therefore not restricted to the executive power.

The alternative is thus whether European administration *ex* article 298(1) TFEU fits the former or the later conception. The precedent of this provision, like almost every novelty the Treaty of Lisbon has introduced in primary law, is to be found in the Constitutional Treaty. Article III-398(1) CT, with the same wording of article 298(1) TFEU, was placed in the section under the title provisions common to Union institutions, bodies, offices and agencies<sup>192</sup>. The contextual interpretation in the Treaty of Lisbon is less clear, as article 298 is awkwardly embedded in the section of the TFEU that establishes the rules of legislative procedures<sup>193</sup>. One should consider that this provision is not linked to the Commission in particular in any way and the precedent in the CT being a common provision to all institutions, agencies, offices and bodies of the Union.

That being said, there are three arguments supporting the idea that the European administration referred to in article 298(1) TFEU is a generic administration rather than the strict view of the continental conception.

-Firstly, the historic and systematic interpretation of the provision brings about that it is applicable to all institutions, including the legislative and judicial institutions.

-Secondly, according to a literal interpretation, the reference to institutions, in plural, entails that it refers to the whole of them, not restricted to the ones with executive powers (particularly, the Commission).

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<sup>192</sup> Section 4 of the Chapter I (Provisions concerning the Institutions) of Title IV (The functioning of the Union).

<sup>193</sup> Section 2 (Procedures for the adoption of acts and other provisions) of Chapter 2 (Legal acts of the Union, adoption procedures and other provisions) of Title I (Institutional Provisions) of Part Six (Institutional and Financial Provisions).

- Thirdly, the second paragraph of article 298<sup>194</sup> links the legislative implementation to the Staff Regulations<sup>195</sup> which are applicable to the official and other servants of all EU institutions and bodies.

As a result, it appears that the meaning of ‘European administration’ shall not equal the traditional notion of public administration. While there are serious doubts that one can argue that the European administration is a public administration as traditionally understood, similar doubts apply to the pertinence of speaking about the principle of separation of powers in the European Union.

When the Vice-president of the European Convention Giuliano Amato in charge of drafting the European Constitution famously said that “Montesquieu never went to Brussels” he implied not only that the doctrine of separation of powers was not applicable to the European Union, but also that it would not be in the farthest-reaching Treaty ever formally written<sup>196</sup>. It is indeed a *locus communis* among EU scholars to deny the applicability of the principle of separation of powers to the EU<sup>197</sup>, sometimes with political intentions of denying any parallelism with the State<sup>198</sup>. One could contend that the Commission does not hold the monopoly of the executive power, because the Council<sup>199</sup> and even the European Council<sup>200</sup> enjoy some competences pertaining to the

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<sup>194</sup> Article 298(2):

“In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.”

<sup>195</sup> Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ English special edition: Series I Volume 1968(I), 30 - 36).

<sup>196</sup> Paolo Ponzano, “Genèse et destinée de la Constitution européenne : commentaire du traité établissant une Constitution pour l’Europe à la lumière des travaux préparatoires et perspectives d’avenir”, in Giuliano Amato, Hervé Bribosia, and Bruno De Witte, *Genèse et destinée de la Constitution européenne*, Bruyant (Bruxelles, 2007), 439-84, at 441.

<sup>197</sup> Koen Lenaerts, “Some Reflections on the Separation of Powers in the European Community”, 28(1) *Common Market Law Review* (1991), 11–35, at 13.

<sup>198</sup> Jacques Ziller, “Separation of Powers in the European Union’s Intertwined System of Government - A Treaty Based Analysis for the Use of Political Scientists and Constitutional Lawyers”, 73(3) *Il Politico* (2008), 133-79, at 134, argues that separation of powers, like federalism and constitution, became taboo in European politics as it might lead to think that the EU might someday become a State.

<sup>199</sup> A common area where authors saw pure executive powers of the Council was implementation through comitology. See Alexander Ballmann, David Epstein, and Sharyn O’Halloran, “Delegation, Comitology and the Separation of Powers in the European Union”, 56(3) *International Organization* (2002), 551-74,

executive power. However, in general terms the functions belonging to the executive power are entrusted to the Commission<sup>201</sup> and, by virtue of decentralisation, to a large extent performed by agencies.

Professor Weiler once wrote that the language of modern democracy revolve around the State, which the EU is not. For this reason, the vocabulary could lead to conceptual shortcomings<sup>202</sup>. This attempt might very well be a piece of evidence of this formalistic inconsistency of the national-EU legal nomenclatures. However, even if this reasoning does not lead to an irrefutable deduction, one can be in a position to conclude that article 298(1) is not in itself revolutionary with regards to the EU public administration under analysis. It is not innovative and it is vague. It might help legal academia to get accustomed to the term ‘administration’ at the level of the European Union and it might provide with an additional nominal argument to advocate for its existence, although, arguably a weak one. It is merely a reflection on the side of the public power of the citizens’ rights conferred by articles 41 and 42 ChFR that speaks of a ‘European administration’ for the first time in the Treaties but in an improper fashion; perhaps with the intention of tackling the many critics against the lack of legitimacy of the Union.

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at 555. The Council traditionally enjoys implementation power, which it normally delegated upon the Commission through the Comitology procedures although could retain the competence for itself (former article 202 TEC). With the wording of article 290 TFEU, it is not so clear that those implementing powers are the Council’s at origin. Besides it might seem that this is indeed a legislative competence, as the Parliament is also involved in control of comitology. So those executive competences are residuary at best. *See* Ziller, “Separation of Powers in the European ...”, at 150. An important executive competence is the Union’s powers in economic policy, which remains exclusively for the Council (Article 121 TFEU), the special provisions in this area of scarce coordination competences at the EU level entail that this is a peculiar example too.

<sup>200</sup> The European Council, a full-fledged institution since the Treaty of Lisbon, shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof according to article 15(1) TEU. These functions are usually performed by governments, but in some cases they are reserved for the head of State, so they are not purely executive competences.

<sup>201</sup> Article 17(1) TEU: “The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union’s external representation. It shall initiate the Union’s annual and multiannual programming with a view to achieving interinstitutional agreements.”

<sup>202</sup> Joseph H. H. Weiler, *The Constitution of Europe: ‘Do the New Clothes have an Emperor?’ and Other Essays on European Integration*, Cambridge University Press (Cambridge, 1999), at 268; “(t)he very language of modern democracy, its grammar, syntax and vocabulary, revolve around the state, the nation and the people ... The Union, it is generally accepted, is not a state. The result is a description of oranges with a botanical vocabulary developed for apples.”



Beyond that, its real implications as some commentators have underlined are in the codification of administrative procedure<sup>203</sup>. Although there is an ongoing debate as to the scope of the provision as a legal basis for codification<sup>204</sup>, the European Parliament has already submitted the Commission a resolution recommending a legislative proposal for Law of Administrative Procedure of the European Union on this legal basis<sup>205</sup>. In any case, this is an aspect which will be dealt with at length in the following chapters<sup>206</sup>.

#### 2.5.2.- *Hierarchy of norms. Articles 290 and 291 TFEU.*

Numerous administrative law scholars consider that the introduction of hierarchy among the different types of legal rules is one of the most significant changes the Treaty of Lisbon has brought about to the area of administrative law<sup>207</sup>.

The formal hierarchy among the different types of legal rules at the secondary law level is introduced by the Treaty of Lisbon in articles 289, 290 and 291 TFEU, as intended by the Treaty establishing a Constitution for Europe<sup>208</sup>, even though the clearer nomenclature of the latter was forsaken in the Treaty of Lisbon.

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<sup>203</sup> Eva Nieto Garrido, “Possible Developments of Article ...”, at 390. Of the two sets of consequences mentioned: legal base for a EU regulation on administrative procedure and the extension of several fundamental rights; only the first really corresponds to article 298, as citizens rights were already recognised in the ChFR.

<sup>204</sup> Morgane Tidghi, “Towards an EU Administrative Procedure Law?”, *Report of the ReNEUAL Conference in Brussels, March 15 and 16, (2012)*, at 11, available at [http://www.reneual.eu/events/ED\\_conference/ReNEUAL\\_conference\\_March\\_2012/Conference%20Report%20Brussels%20March%2015Th%20%2016Th.pdf](http://www.reneual.eu/events/ED_conference/ReNEUAL_conference_March_2012/Conference%20Report%20Brussels%20March%2015Th%20%2016Th.pdf). Qualified voices have engaged a debate on whether that assumption is valid. In a recent conference, GC president Jaeger argued that this article shall be developed into the codification of procedural administrative rules already existing in various sources; whereas former GC judge Legal, expressed the view that this provision had mostly internal relevance, and was limited to the relations between the EU institutions and their supportive administration

<sup>205</sup> European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)).

<sup>206</sup> See Section 3.4.5.

<sup>207</sup> Schwarze, “European Administrative Law ...”, at 294; Bruno de Witte, “Legal Instruments and Law-Making in the Lisbon Treaty”, in: Stefan Griller and Jacques Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, Springer (Vienna, 2008), 79-108; and, concerning the provisions of the Constitutional Treaty, Paul Craig, “The Hierarchy of Norms”, in Takis Tridimas and Palisa Nebbia (eds.) *European Union Law for the Twenty-First Century, Rethinking the New Legal Order, Volume I. Constitutional Law and External Relations*, Hart (Oxford, 2004), 75-93.

<sup>208</sup> Article I-33 and I-36.



As a result, to the traditional list norms approved thought the legislative procedure, henceforth named legislative acts in article 289<sup>209</sup> TFEU, articles 290<sup>210</sup> and 291<sup>211</sup> TFEU add the categories of delegated acts and implementing acts. Hence, there are three normative levels corresponding to legislative, delegated and implementing acts<sup>212</sup>. The distinction is also relevant in terms of access to justice, since article 263(4) TFEU establishes different requirements of legal standing for individuals when challenging regulatory acts not entailing implementing measures compared with the classical conditions when challenging legislative acts.<sup>213</sup>

That hierarchy existed before the Treaty of Lisbon but it was not enshrined in primary law. It was frequent that a regulation adopted through co-decision would confer either the Commission or a comitology committee the power to adopt other acts implementing it<sup>214</sup>. Thus, formalization of this hierarchy of norms constitutes a major step in terms of clarification of normative instruments. More importantly for our purposes, it introduces an additional argument when it comes to the conceptualisation of the European public administration. By recognising a normative power which functions differently of legislative power and endowed to different entities, basically to the

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<sup>209</sup> Article 289(1): “The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.”

<sup>210</sup> Article 290(1): “A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.”

<sup>211</sup> Article 291(2); “Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.”

<sup>212</sup> Franz Leidenmuehler, “Is there a Closed System of Legal Acts of the European Union after the Lisbon Treaty? The Example of Unspecified Acts in the Union Policy on the Environment”, 2(4) *International Constitutional Law Journal* (2010), 191-202, at 195.

<sup>213</sup> Although there were doubts among legal scholars in the interpretation of this new provision, the GC in its interpretation developed in cases *Inuit* and *Microban* has stated clearly that the distinction between legislative and non-legislative (*i.e.* regulatory) acts determines the legal regime of access to justice for individuals. See further cases GC, Case T-18/10, *Inuit Tapiriit Kanatami / Parliament*, [2011] ECR II-5599; and Case T-262/10, *Microban / Commission*, [2011] ECR II-7697.

<sup>214</sup> Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2006), at 99.

Commission, at times to the agencies, it contributes to sharpening the separation of the executive power from the legislative power<sup>215</sup>.

This element became visible during the debates in the Convention charge with the drafting of the Constitutional Treaty. The Working Group in charge of simplification acknowledged that “hierarchy of norms was the consequence of a clearer separation of powers”<sup>216</sup>. The three objectives of this Working Group were: normative simplification, democratic legitimacy, and separation of powers. They argued in their final report to have met them all with the hierarchy of norms, stating that “[t]his brings us directly to a clearer hierarchy of legislation, which is the consequence of a better separation of powers. This is not with the aim of paying tribute to Montesquieu, but out of concern for democracy.”

Therefore, the Treaty of Lisbon introduces a clearer split between the legislative and the executive branches of the Union, departing from the formerly blurred allocation of normative competences, legislative and non-legislative, and establishing a greater coherence by formally matching the organic-institutional distinction between institutions to the rule-making powers granted depending on the kind of norms they can approve<sup>217</sup>. That is, the legislative power awarded to the Parliament and to the Council, and the non-legislative power awarded to the Commission, eventually with the help of the agencies. In particular, the category of non-legislative acts of general application, the so-called implementing acts, unveils true existence of an administration with rule-making powers comparable *mutatis mutandis*<sup>218</sup> to those existing at the national level,

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<sup>215</sup> Robert Schütze, “Sharpening the Separation of Powers through a Hierarchy of Norms. Reflections on the Draft Constitutional Treaty’s regime of legislative and executive law-making”, *EIPA Working Paper* 2005/W/01, at 17.

<sup>216</sup> CONV 424/02, Final report of Working Group IX on Simplification, of 29 November 2002, at 2. Available at [http://ec.europa.eu/archives/futurum/documents/offtext/doc291102\\_en.pdf](http://ec.europa.eu/archives/futurum/documents/offtext/doc291102_en.pdf). The three objectives of this WG were normative simplification, democratic legitimacy, and separation of powers. They argued to have met them all with the hierarchy of norms, stating: “This brings us directly to a clearer hierarchy of legislation, which is the consequence of a better separation of powers. This is not with the aim of paying tribute to Montesquieu, but out of concern for democracy.”

<sup>217</sup> Deidre Curtin, Herwig C.H. Hofmann, and Joana Mendes, “Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda”, 19(1) *European Public Law* (2013), 1-21.

<sup>218</sup> Those rule making powers of the Commission are different, in particular, as the adoption of such acts requires the intervention of Member States and the European Parliament though the comitology procedures, as provided for in Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers (OJ 2011 L 55, 13-18).

even though a clear-cut line to distinguish when implementing acts and when delegated acts apply has still not been drawn<sup>219</sup>.

### 2.5.3.- Administrative cooperation. Article 197 TFEU

The new Title XXIV<sup>220</sup> TFEU on Administrative Cooperation also stems from the assumption that there is a European public administration, and that it shall cooperate with national public administrations in order to effectively implement EU law. Containing a single provision, article 197 TFEU reads:

“1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.

2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary

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<sup>219</sup> Many authors wrote on the uncertainty of the criteria that would determine when implementing acts or delegated acts should apply. They awaited for a clear distinction to solve the conundrum by the Court of Justice when the question was clearly asked in form of an action for annulment by the Commission to a Regulation of the European Parliament and the Council. In its response in the ruling in case C-427/12, Commission / European Parliament and Council (*Biocides*), judgement of 18 March 2014, not yet published, it did not give a conclusive answer, see more Dominique Ritleng, "The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in Commission v. Parliament and Council (*Biocides*)", 52 *Common Market Law Review* (2015), 243–258.

<sup>220</sup> Again, the Treaty of Lisbon is heir of the innovation introduced by the Constitutional Treaty in Title III, Chapter V, Section 7, Article III-285.

"2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.”

measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.”

This provision might interpreted as a reinforcement of the traditional scheme of indirect administration<sup>221</sup> –the three paragraphs refer to implementation by member states of Union law– as well as the traditional procedural autonomy that member states enjoy –by explicitly excluding harmonisation of national law regarding implementation–. It is noteworthy that one of the most prominent European administrative law scholars, professor Schwarze, appears sceptical of the autonomous legal value of such provision<sup>222</sup>. There is a call for voluntary cooperation, even exemplified by the exchange of information and of civil servants<sup>223</sup>; but in practice the cooperation developed so far goes much deeper than that.

Where is then the innovation of this provision? It appears that it emphasises the need of cooperation between the Union and member states regarding implementation, although it is still considered a primarily national competence. It seems as if the draft of this article was aimed at reinforcing cooperation, which is deemed a necessity given the sometimes insufficient national administrative capacity<sup>224</sup>, while leaving the traditional patterns untouched. The aim is thus to adapt to what has proven the real functioning of implementation without touching the spine; implementation is to be carried out by Member States.

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<sup>221</sup> Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge University Press (Cambridge, 2010), at 85

<sup>222</sup> Schwarze, “European Administrative Law ...”, at 286.

<sup>223</sup> *Ibid.*, at 294.

<sup>224</sup> Phedon Nicolaides, “Administrative Capacity for Effective Implementation of EU Law”, 1 *EIPASCOPE* (2012), 5-11, at 6.

There is a substantial change in the patterns of implementation, not merely in terms of practical support. Union's law is implemented often jointly, in a composite way, but the rules are also designed with a more than nominal participation of Member States. It could also be interpreted as aiming to build a legal wall against the influence of European rules and practices in the administrative systems of member states, which, as detailed later, is already an unstoppable phenomenon. This article arguably comes too late and corresponds to a model that is largely overcome. An example of that kind of camouflage consisting on leaving the simple traditional schemes virtually valid, although rarely used in practise.

Finally, it is important to point out that this provision was introduced by the Treaty of Lisbon without prejudice to the general obligation of sincere cooperation of article 4(3) TEU, and therefore limits its scope to administrative cooperation<sup>225</sup>.

#### *2.5.4.- Fundamental rights. Articles 41 and 42 ChFR*

Some of the rights included in the Charter of Fundamental Rights, which becomes legally binding as from the entry into force of the Treaty of Lisbon according to article 6(1) TEU, entail the existence of a European administration and impose obligations onto it. It is the case of article 41 ChFR<sup>226</sup>, which grants a right to a good administration, and article 42 ChFR<sup>227</sup>, which recognises a right to access to documents.

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<sup>225</sup> Schwarze, "European Administrative Law ...", at 294.

<sup>226</sup> "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

<sup>227</sup> "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents."

The Court of Justice had already recognised and elaborated on those rights<sup>228</sup>. Firstly, related to the right to a good administration as the Court of Justice developed the principle of good and sound administration<sup>229</sup> for the Institutions, and for the Commission in particular. Secondly, it accepted the right of access to documents. This right was recognised later as it could not establish it as a general principle of law flowing from the constitutional traditions common to the member states<sup>230</sup>. Even with the judicial precedent, the fact that they have gained a legally binding character at the level of primary law is also essential for the consolidation of European administrative law<sup>231</sup>.

The right to a good administration elevated to the category of fundamental right has far-reaching consequences for the configuration of a European public administration. The novelty of Article 41 of the Charter is that it transforms some elements of traditional principles of administrative law, like the principle of legality, into subjective public rights, thus configuring a public administration against which citizens can enforce their rights. This means that the European administration must not only comply with certain objective principles, like openness or efficiency, but that it must serve the citizens and be accountable to them<sup>232</sup>.

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<sup>228</sup> "Explanations relating to the Charter of Fundamental Rights", provided by the praesidium of the Convention that drew up the Charter. OJ 2007 C 303. 17-35.

<sup>229</sup> See for example CFI, Case T-24/90 *Automec / Commission* [1992] ECR II-2223, paragraph 79; CFI, Case T-95/96 *Gestevisión Telecinco / Commission* [1998] ECR II-3407, paragraph 53; CFI, Case T-54/99, *max.mobil / Commission*, [2002] ECR II-313, paragraph 48; CFI, Case T-48/05, *Franchet and Byk / Commission*, [2008] ERC II-1585 or, more broadly, CJEC, Joint Cases 142/84 and 156/84 *BAT and Reynolds / Commission* [1987] ECR 4487, paragraph 20; and CJEC, Case C-449/98 *P IECC / Commission* [2001] ECR I-3875, paragraph 45. For further details in the development of the case-law on the principle of good and sound administration, see Koen Lenaerts, "'In the Union we trust': Trust-enhancing principles of Community law", 41(2) *Common Market Law Review* (2004), 317-43, at 336. Also, Miguel Antonio Guevara Quintanilla, *El derecho a la buena administración*, Publicaciones de la Universidad Complutense (Madrid, 2010), at 133.

<sup>230</sup> See Opinion of AG Léger, Case C-41/00 P, *Intercorp / Commission*, [2003] ECR I-2125, paragraph 80. This right was introduced *de lege data* by Regulation 1049/2001 of the European Parliament and of the Council, of 30 May 2001, regarding public access to European Parliament, Council and Commission documents procedures (OJ 2001 L 145, 43-48, and subsequently developed by the case law of the Court of First Instance in CFI, T-194/04, *Bavarian Lager / Commission*, [2007] ERC II-4523; and GC, T-233/09, *Access Info Europe / Council*, [2011] ECR II-1073.

<sup>231</sup> Schwarze, "European Administrative Law in the Light...", at 286, also, Ivan Kopric, Anamarija Musa and Goranka Novak, "Good administration as a ticket to the European Administrative Space", 61 (5) *Collected Papers of Zagreb Law Faculty*, 2011, 1515-60, at 1526.

<sup>232</sup> Klara Kanska, "Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights", in 10(3) *European Law Journal* (2004), 296-326, at 300.

The formal recognition of these citizens' rights is critical in the configuration of an open, efficient and independent European administration<sup>233</sup>. The foreseeable further development of such rights through secondary law will bring about a clearer, more defined functions as well as formal administrative patterns for the European public administration to act. Again, they also presuppose the existence of a European administration, and the cooperative schemes existent with, mainly, Member States, shall accommodate to be compliant with them.

#### *2.5.5.-The constitutionalisation of the European public administration*

Back in 2003, with nothing more on the table than the Treaties in the consolidated version of the Treaty of Nice, Paul Craig argued that there was a constitutionalisation<sup>234</sup> of Community administration<sup>235</sup>. He based his thesis on the Financial Regulation of 2002<sup>236</sup>, that is, a piece of secondary legislation. He was certainly speaking at a substantive, not formal, level and he considered "the emergence of overarching principles that frame the entirety of Community administration"<sup>237</sup> signified the constitutionalisation of such administration.

With the Treaty of Lisbon some of the principles framing the European administration are written in the primary law. But not only. Separation of administrative rule-making powers from legislative competences and, not without a certain degree of ambiguity, the use of the expression "European administration" is now in the Treaties. Hence, there is a formal constitutionalisation of the European public administration.

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<sup>233</sup> Nieto Garrido, "Disposiciones pertinentes del...", at 67.

<sup>234</sup> It is generally accepted among scholars that EU primary law has a constitutional nature. *See* for instance, Christoph Möllers, "Pouvoir Constituant- Constitution- Constitutionalisation", in Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing (Oxford, 2006) 183-226.

<sup>235</sup> Paul Craig, "The Constitutionalization of Community Administration", in Tom Ginsburg, Robert A. Kagan (eds.) *Institutions & Public Law: Comparative Approaches*, Peter Lang (New York, 2005), 171-202, first published as a paper in 2003 Paul Craig, "The Constitutionalization of Community Administration", Jean Monnet Working Paper 3/03, available at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/03/030301.rtf>

<sup>236</sup> Council Regulation (EC, Euratom) n° 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, 1).

<sup>237</sup> Craig, "The Constitutionalization of...", at 171.



All the aforementioned provisions included in the Treaty of Lisbon, even article 197 TFEU with its unclear intention, contribute to this constitutionalisation. Furthermore, the Treaty of Lisbon also sets constitutional limits to the European administration, like the democratic and rule of law principles, principle of equality, principles of transparency and participation, among others<sup>238</sup>.

In conclusion, the existence of a European administration can no longer be refuted, something which has major consequences for the development of this dissertation. But what European public administration are we talking about?

## ***2.6.- What public administration? A European administration, a Union administration and an integrated administration of the EU.***

### *2.6.1.-Arguments for a European public administration*

The Treaty of Lisbon is revolutionary in many aspects of European administrative law, and certainly it provides a key argument supporting the existence of a European public administration. The formalistic argument is indeed a major element to advocate for the existence of a Union's public administration. But there are additional arguments.

In this vein, the meaning and the scope of article 298 is not clear. As previously argued, it appears from the wording and the historical background that the 'European administration' does not refer to the public administration linked to the executive in the old French sense of the word but rather to the administrative apparatus of all institutions, agencies and bodies of the Union. Additionally, the focus of the drafters of the Treaty is on the characteristics of openness, transparency, and efficiency, already required by the ChFR. Hence, the enshrinement in the Treaties of European administration is, despite the doubts cast, a relevant argument, but there are others.

A public administration, in the general sense of the concept, cannot be limited to a mere general secretariat of an international organisation. Certainly, those permanent

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<sup>238</sup> Oriol Mir-Puigpelat, "La codificación del procedimiento administrativo en la Unión Administrativa Europea", en in Jens-Peter Scheider, and Francisco Velasco Caballero, *La unión administrativa europea*, Marcial Pons (Madrid, 2008), 51-85, at 55.



bodies administer some tasks, conferred by States by virtue of an international treaty. The public administration of the European Union is qualitatively different from them.

First of all, the European Union is distinct from international organisations inasmuch as there is an autonomous legal order stemming from it. As the Court of Justice established from one of its first rulings, *Costa / Enel*<sup>239</sup>:

“By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

[...]

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the community itself being called into question .”

Since there is an autonomous legal order arising from an independent source of law, the European Union has an antithetic nature as compared with other international organisations.

The evolution of European integration has led to an exponential growth of competences and an expansion of areas covered by the functions of the Union. At the moment, there is almost no field of administrative action by public authorities that is not under some degree of competence of the EU. This almost global scope of competences is radically different from any other international organisation.

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<sup>239</sup> Case 6/64, *Costa / ENEL*, judgement of 15 July 1964, [1964] ECR 585.

The exercise of these competences requires large administrative capabilities. A share of those capabilities corresponds to national public administration, put at the service of the Union's objectives through the mechanism of indirect administration. However, as we have seen, those schemes are becoming obsolete. There is an increasing direct administration, especially in the areas of exclusive competence of the Union, and more notably a share of executive competences through cooperation, which constitutes the central part of this work. There is, thus, a European public administration to carry out this wide spectrum of far-reaching administrative capabilities.

Additionally, the European Union, by virtue of this vast array of administrative powers, often maintains direct relationships with private parties. This is again a dissimilar element from any international organisation since, with very limited exceptions, the individual does not have a relevant status in public international law. Thus in the EU, the public administration imposes sanctions, awards subsidies, awards technical approvals, inspects material conditions, and so on. Sometimes with cooperation of national authorities, and sometimes without it. This direct relationships results in legal remedies that individuals may bring against Union's measures, both as administrative appeals and judicial actions, as individuals enjoy legal standing before the European judges.

#### *2.6.2.-The polysemy of a 'European public administration'*

Before the Treaty of Lisbon the use of the terms European public administration was split among legal scholars. Owing to the fact that the bodies in charge of the execution of EU law were primarily national administrations, often with the cooperation of Union's Institutions or agencies, and seldom the latter by themselves, many commentators did not feel comfortable with the words European administration until recently, and many of them preferred to use opener and vaguer terms. Thus, this reality is often referred to with the expression "European administrative space"<sup>240</sup>. More

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<sup>240</sup> Martin Shapiro, "The Institutionalization of European Administrative Space", in Alec Stone Sweet, and Wayne Sandholtz, and Neil Fligstein (eds.), *The Institutionalization of Europe*, Oxford University Press (Oxford, 2001); Nikolaos Lymouris, "Understanding the European Administrative Space" , Academic Public Administration Studies Archive Papers 291 (2011); Carlo D'Orta, "What Future for the European Administration Space?", *EIPA working paper* 2003/W/5 (2003); Jarle Trondal and Guy Peters,

specific denominations found in academic publications are “European executive order”<sup>241</sup> or “European Composite Administration”<sup>242</sup>.

German doctrine has referred to the phenomenon with different denominations too. For example, the term *Verwaltungskooperation* (administrative cooperation) was used initially by professor Schmidt-Aßmann<sup>243</sup>, while other authors would speak of a *Mischverwaltung* (mixed administration)<sup>244</sup>. More recently, German scholarship generally uses the term *Europäischer Verbundverwaltung* (European administrative union)<sup>245</sup>.

It was the vestige of Monnet’s minimalist conception of a European public administration, more of a designer and facilitator than a true administrator. However, some authors did dare to write on a European administration and there were good legal reasons for that<sup>246</sup>, but what they meant with European public administration was sometimes diverse.

Administration as a general notion can be understood as the “practical management and direction of the public machinery”<sup>247</sup>. From a more specific EU perspective, it is the public machinery that implements and executes EU law. European public administration is a more complex concept than any national administration

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“The Rise of European Administrative Space – Lessons learned”, Arena working paper, 1/2012; and Heid Breder, “Structuring the European...”.

<sup>241</sup> Jarle Trondal, *An Emergent European Executive Order*, Oxford University Press (Oxford, 2010).

<sup>242</sup> Oswald Jansen and Bettina Schöndorf-Haubold (eds.), *The European Composite Administration*, Intersentia (Antwerpen, 2011).

<sup>243</sup> Eberhard Schmidt-Aßmann, “Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft”, 31 *Europarecht* (1996), 270–301.

<sup>244</sup> Stefanie Schreiber, *Verwaltungskompetenzen der Europäischen Gemeinschaft*, Nomos (Baden-Baden, 1997), at 54.

<sup>245</sup> German authors have contributed largely to this topic, see Jens-Peter Scheider, “Estructuras de la Unión Administrativa Europea –Observaciones introductorias–”, in Jens-Peter Scheider, and Francisco Velasco Caballero, *La unión administrativa europea*, Marcial Pons (Madrid, 2008), 25-50, at 26, quoting among others, Eberhard Schmidt-Assmann, and Bettina Schöndorf-Haubold, (dirs.) *Der Europäische Verwaltungsverbund*, Mohr Siebeck (Tübingen, 2005); Gabriele Britz, “Vom Europäischen Verwaltungsverbund zum Regulierungsverbund? Europäische Verwaltungsentwicklung am Beispiel der Netzregulierung von Telekommunikation, Energie und Bahn”, *Europarecht* (2006), 46-77.

<sup>246</sup> Among other arguments, the term administration was used in primary and secondary law, though mostly in an incidental manner. See notes 180, 181 and 182.

<sup>247</sup> Definition found in the Oxford Dictionary of Law, Oxford University Press, (Oxford, 2009).

because, as previously argued, both the European and national level of administration are in charge of creating, implementing and enforcing European law.

The European Union's public administration can be understood *stricto sensu* as the complex of government bodies exercising administrative powers in the European Union, which includes the Commission, agencies and other official bodies. However, this is not necessarily equivalent to the notion of European administration. The most authoritative scholars in the field European administrative law conceive European administration as the combination<sup>248</sup> of Union's public powers and national administration responsible for implementing Union's measures and acting as decentralised, Union government bodies<sup>249</sup>, and whose powers and functions are fragmentary and can be different in each policy area<sup>250</sup>. In other words, as della Cananea has put it, the European Administration is a polycentric Administration<sup>251</sup>. A notion of European administration has to leave behind the differentiation between Union implementation and national implementation, and assume that it is a joint European administration<sup>252</sup>.

If European administration is understood as "organisational apparatus entrusted with implementing EU law"<sup>253</sup>, we would likewise have to accept that national administrations, sub-national administrations and even sometimes private actors are included in that apparatus<sup>254</sup>. At least from a functional point of view, national

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<sup>248</sup> Edoardo Chiti, "Decentralised Integration as a New Model of Joint Exercise of Community Functions?", 31, *ARENA Working Papers* (2002), at 2.

<sup>249</sup> Chiti, "Forms of European...", at 47.

<sup>250</sup> Claudio Franchini, "I principi dell'organizzazione amministrativa comunitaria", 3 *Rivista Trimestrale di Diritto Pubblico* (2003) 651-70, at 653.

<sup>251</sup> Giacinto Della Cananea and Claudio Franchini, *I principi dell'amministrazione europea*, Giappichelli Editore (Torino, 2010), at 29.

<sup>252</sup> Jens-Peter Schneider, "Regulation and Europeanisation as Key Patterns of Change in Administrative Law", in Matthias Ruffert (ed.), *The Transformation of Administrative Law in Europe/La mutation du droit administratif en Europe*, Sellier, (Munich, 2007), 309-24, at 313.

<sup>253</sup> Oriol Mir-Puigperlat, "Arguments in favour of a general codification of the procedure applicable to EU administration", Briefing note by the Directorate-General of Internal Policies of the European Parliament, at 7, available at <http://www.ub.edu/dadmin/Oriol%20Mir/Publicacions/euoparl.europa.eu.english.pdf>

<sup>254</sup> Jesús Ángel Fuentetaja Pastor, *La Administración Europea*, Civitas (Madrid, 2007), at 53 and 113. This work makes a nominal distinction between the Community administration, *Administración comunitaria*, which refers only to EC entities, and European administration, *Administración europea*, which included national administrations when they execute European law.

administrations implementing European law are indeed European administration<sup>255</sup>, together with the Union's public administration.

An explanatory example of this conception is Kassim's definition of European administration as is "an amalgam of the European and the national marked by the interpenetration and interdependence"<sup>256</sup>. National administrations, he argues, have permeated EU decision-making structures, are present in all areas of EU activity, and to a large degree condition the functioning of EU institutions.

The Treaty of Lisbon brings about a potential scholarly review of some of these assumptions. Article 298(1) refers to a European administration which, from the organic point of view shall be at the Union's level. From the point of view of the activities performed, national administrations' officials are also European administration like, as a matter of fact other actors could be. But cooperation is currently so intense that one could argue that European bodies are, they too, part of national administrations from a functional point of view.

European administration cannot be conceived without the support of national administrations. As evident as this idea is –dating back to the Monnet's early design for the Communities–, one can argue today that there is an autonomous legal notion of a European administration, and that it has been constitutionalised by the Treaty of Lisbon. Furthermore, it is a notion to be developed on that legal basis by secondary legislation<sup>257</sup>. Except for a few areas, this administration is inoperative if considered alone from a functional point of view. But from a structural point of view it exists independently, even though its most remarkable feature is its openness, permeability and interwoven links to national administration and other actors. According to the first scholarly conception, however, the cooperative element of European administration is so entrenched in its nature that it is deemed part of its definition more than a feature.

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<sup>255</sup> Ángel Manuel Moreno Molina, "La Administración Pública de los Estados miembros como Administración comunitaria. Referencia a la situación española", in Luciano Parejo Alfonso, Tomás de la Cuadra-Salcedo, Ángel Manuel Moreno Molina, and Antonio Estella de Noriega, *Manual de Derecho Administrativo Comunitario*, Editorial Centro de Estudios Ramón Areces (Madrid, 2000), 145-92, at 145.

<sup>256</sup> Hussein Kassim, "The European Administration: Between Europeanization and Domestication", in Jack Hayward and Anand Menon (eds.), *Governing Europe*, Oxford University Press (Oxford, 2003), 139-61, at 156.

<sup>257</sup> Nieto-Garrido, "Possible Developments of Article 298...", 374.

This concept in strictness of a European public administration is, in my view, more practical for the legal assessment of the procedures through which it administers, in cooperation with the other public administrations, true, but still organically distinct, and, at last, with a constitutional nature.

For the sake of clarity, the term European Union public administration, EU administration or Union administration to refer to the Union's administrative bodies; and European administration *lato sensu* for all bodies, Union's and national, entrusted with administrative functions. This conception is not contradictory with the wording of Article 298(1) TFEU. On the contrary, as professor Craig has argued that Article 298(1) TFEU has two parts, the first refers to the 'institutions, bodies, offices and agencies of the Union', and the second evokes 'the support of a ... European administration'<sup>258</sup>. This difference reflects the fact that the European administration goes beyond the elements of institutions, bodies, offices and agencies of the Union, which could constitute strictly speaking the administration of the EU. Thus, European public administration is the EU administration as well as national public administrations when implementing EU law and policies, be it in the context of indirect administration or in the context of composite procedures.

In order to complete the characterization of European administration, it is useful to cite the conclusions of the recent works of professors Hofmann and Türk. They advocate for the use of the term integrated administration<sup>259</sup>. To these scholars, European administration is not so much a multilevel system in the sense of a hierarchy superimposed on member state administrations. It is rather a system of integrated level of administrative action in Europe<sup>260</sup>, in which direct and indirect administration is no longer distinguishable<sup>261</sup>.

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<sup>258</sup> Paul Craig, "A General Law on Administrative Procedure, Legislative Competence and Judicial Competence," 19 *European Public Law* (2013), 503-24, at 512.

<sup>259</sup> Herwig C. H. Hofmann and Alexander H. Türk, (eds.) *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, Edward Elgar Publishing (Cheltenham, 2009).

<sup>260</sup> Hofmann and Türk, *Legal Challenges in EU...*, 2.

<sup>261</sup> Curtin and Egeberg, "Tradition and Innovation...", 649.

As striking as it may seem, the enshrinement of the European public administration in primary law, thus making it more visible and defined, has come together with invigoration of the trend towards a more interwoven action of both national and European administrations. Intense cooperation between the national and European level in all phases of the policy circle has become the rule.

This cooperation is not incompatible with some other clarifications and delimitations included in the Treaty of Lisbon. The prime example is the distribution of competences between the European Union and Member States<sup>262</sup>, but there are others, like more enforceable rules on principle of subsidiarity through the monitoring procedures for compliance with it<sup>263</sup>, which should incardinate administrative action in the closest level of administration to the citizen as possible.

As De Búrca has argued there is an evident paradox between these new provisions and what she describes as a “depiction of a clear division of powers amongst levels of authority in accordance with a static version of the subsidiarity principle, and the actual fluid sharing of powers and responsibilities amongst different levels in a more dynamic way”<sup>264</sup>.

Thus, not only is the Union’s public administration dependent on national administrations, but national administrations are increasingly recipients of a great influence from European structures, procedures, and, indeed, administrative action. This is surprising because, from a formal and theoretical perspective, administrative policy remains in the hands of national administrations and they are protected by the principle of respect for procedural autonomy. This legal framework is not only maintained in the Treaty of Lisbon but, apparently, reinforced by article 197 TFEU.

Actually, however, things are considerably different. The old formulation of procedural autonomy states that implementation of EU law is governed by the

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<sup>262</sup> See articles 2 to 6 of the Treaty on the Functioning of the European Union

<sup>263</sup> See article 5(3) TFEU and Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

<sup>264</sup> De Búrca, “The Constitutional Challenge...”, at 814-15.



institutional and procedural rules of member states<sup>265</sup>. Only two conditions developed by the Court of Justice were necessary in order for national procedures to be acceptable<sup>266</sup>: equivalence –member states shall not discriminate between claims based on national law and on EU law–; and effectiveness –enforcement of EU law shall not be impossible or excessively difficult–. Even though the dual requirement remained facially unchanged, the Court of Justice became progressively more interventionist vis-à-vis national rules<sup>267</sup>. Today, many scholars accept that procedural autonomy of member states is more of a legal fiction than a fully enforceable principle<sup>268</sup>.

In the same vein, there is a process of “Europeanization” of national administrations. This phenomenon reflects in the change of domestic procedures, styles and even structures<sup>269</sup>. National patterns of governance, react and adapt to the challenges and opportunities arising from the administrative action of the Union and are thus subject to strong impact from the European Union<sup>270</sup>. The clash between the

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<sup>265</sup> The traditional formulation of this principle results from the case-law in CJEC, Case 33/76, *Rewe-Zentralfinanz / Landwirtschaftskammer für das Saarland*, judgement of 16 December 1976 [1976] *ECR* 1989, paragraph 5: “in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature [...] the position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.” Since then this declaration has been reiterated in numerous rulings Case 45/76 *Comet* [1976] *ECR* 2043, paragraph 12; Case C-213/89 *Factortame and Others* [1990] *ECR* I-2433, paragraph 19; and Case C-432/05 *Unibet* [2007] *ECR* I-2271, paragraph 38.

<sup>266</sup> Michal Bobek, “Why There is no Principle of ‘Procedural Autonomy’ of the Member States”, Bruno de Witte and Hans Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* Intersentia (Antwerp, 2011), 305-22, at 312-16.

<sup>267</sup> The paramount example of this evolution is the ruling in CJEC, C-213/89, *The Queen / Secretary of State for Transport, ex parte Factortame*, judgement of 19 June 1990, [1990] I-2433, where the Court of Justice declared that a British Court had to set aside a national rule, which excluded interim measures, in order to comply with European Law. See further, Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law. Text and Materials*, Cambridge University Press (Cambridge, 2010), at 279-280.

<sup>268</sup> Diana-Urania Galetta, *Procedural Autonomy of EU Member States : Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, Springer (Hedelberg, 2011), at 121.

<sup>269</sup> See Christoph Knill, *The Europeanisation of National Administrations. Patterns of Institutional Change and Persistence*, Cambridge University Press (Cambridge, 2001). In particular, he refers to some empirical changes, like the adoption of a European model of regulatory policy (see at page 37) of influences in administrative reform in some member states (see page 111).

<sup>270</sup> Andreas Maurer and Wolfgang Wessels “The European Union matters: structuring self-made offers and demands”, in Wolfgang Wessels, Andreas Maurer, Jürgen Mittag (eds.), *Fifteen Into One?: The European Union and Its Member States*, Manchester University Press (Manchester, 2003), 29-65, at 56.



pluralist model of the EU and the statist model of most national administrations results most often in the superimposition of the EU patterns<sup>271</sup>.

A compelling example is the trend towards a more decentralized and less politicized national administration on several technical and autonomous bodies<sup>272</sup>, sometimes as a result to some EU law obligations to member states<sup>273</sup>. The proliferation of agencies and expert committees provide evidence for this transformation, as advanced by the Commission's White Paper on European Governance<sup>274</sup>, a phenomenon that happens at the UE level and drags national structures along. Joint administrative action often takes place involving national and EU agencies, rather than national governments and the Commission.

In sum, a vision of the European public administration *lato sensu* composed on a central EU public administration but heavily reliant on its national counterparts corresponds to just one side of the overall picture. The relations between EU administration and national administrations are mutually dependent and increasingly interwoven. Hence the adjective integrated for a newly constitutionalised European administration is in the current state-of-affairs fully pertinent.

## **2.7.- Conclusions**

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<sup>271</sup> Vivien Schmidt, "National pattern of governance under siege: the impact of European integration", in Rainer Eising, Beate Kohler-Koch (eds.), *The Transformation of Governance in the European Union*, Routledge (London, 1999), 155-72, at 161.

<sup>272</sup> See Balint, Bauer and Knill, "Bureaucratic change ...", at 69.

<sup>273</sup> For instance, article 3 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108 , 33-50) compels members states to have an independent regulatory body in the field of electronic communications networks and services: "1. Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body. 2. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services."

<sup>274</sup> It is worth mentioning that the Commission, in its White Paper on European Governance, fosters the creation of regulatory agencies, thus losing some of its former functions, to focus its resources on core tasks, as it sees them fitter for drawing on highly technical know-how, their increased visibility for the sectors concerned and their cost efficiency. See in particular, pages 23-24 of the Commission's White Paper on European Governance COM(2001)428, at [http://ec.europa.eu/governance/white\\_paper/index\\_en.htm](http://ec.europa.eu/governance/white_paper/index_en.htm).

The analysis of the European public administration is not simple and does not lead to straightforward conclusions. A European public administration exists, not only because it is mentioned in primary law, but because the administrative organisation at the European Union level has the essential structural, characteristics and functions that are attributed to 'public administrations', as a legal concept, which is a concept generally confined to the national level of government.

That being said, there are many relevant peculiarities of the European public administration. It is structurally much lighter than its national counterparts, as it has traditionally relied largely on the support of Member States' administrations. In its functions, it rarely implements EU law and policies directly. However, it does not leave implementation exclusively to national public administrations, as the pattern of indirect administration would entail, but participates more and more in that implementation through different mechanisms of cooperation with national public administrations. It also tends to be a more open (receptive of external influences, not only of Member States, but also other type of stakeholders) and decentralised (with a major role for agencies), than most national administrations. The key distinguishing element of European public administration lies on the existence of intense cooperation in most of the duties it performs. This element is, furthermore, essential for the development of the thesis.

It would be logic to assume that the enlargement of the Union's administrative action, through an increasing involvement in the implementation of the EU policies, came together with the invigoration of an autonomous concept of European administration. To some extent, it is true that the European public administration is strengthened from a legal perspective and receives more attention in the Treaty of Lisbon than ever before in the history of European integration. However, the trend does not necessarily point towards a centralisation of administrative competences. A devolution of administrative competences to member States' administrations is not happening either, as the functions to execute remained always at the national level. It is rather a process of mixitisation, in the context of more mechanisms of cooperation, whose legal analysis is complex, whose legal framework is not clearly discernible.

As a result, we find a European public administration which is not prone to a general theoretical characterisation either, surprisingly, at the moment that it receives a

formal status in the Treaties. Although one could argue that a European public administration also existed before, historically, the reliance on the implementing powers and capacities of national administration was significantly larger. At present, as we have argued, that reliance has turned into a much more complex cooperation.

The paradigm of a Union administration that sets the rules and twenty-eight national administrations that implement and enforce, however elegant as it may seem from an academic point of view, has become obsolete. So the original idea that, after all, a European administration is not so important because national administrations are, in a executive federalism model, “the public administration” of the EU –if there ever was some truth in it–, does not reflect the current reality. Even though the European administration does not drag all the Weberian reminiscences of national bureaucracies, it still carries some old assumptions that legal scholarship might at times seem resultant to do away with.

The striking paradox is that the European public administration becomes constitutionalised and executive action finally receives a more formal and comprehensive characterization in the Treaties, yet at the same time it seems like the European administration is departing even farther from the paradigm of a formal administration in the traditional sense of bureaucracy. Any description of how administrative action work in the EU has to consider the complexity and diversity of the intense level of interwoven cooperation between Member States and European bodies.

Autonomy and, especially, procedural autonomy has enjoyed much scholarly attention, but only from the side of member States, that is, to which degree they have been able to maintain the procedural autonomy they are endowed with in spite of the influx of EU law. Indeed, given the current functioning of the Union it is a *quimera* to talk about autonomy, either from the national or from the European public administration. Both are mutually dependent.

Administrative integration, even without any general formal legal basis to support it, is presently reinvigorated. The schemes of cooperation between Member States and Union’s institutions, agencies and bodies forcefully results in a certain process of symbiosis between both levels. At the same time, the Treaty of Lisbon aims

at simplification and, in particular, a clearer division of competences which, many could argue, would point out to a clearer federal structure. Here again there is a remarkable paradox, administrative integration lead neither towards a centralised European administration nor towards network with more understandable patterns, but towards a polycentric administrative organisation<sup>275</sup>.

This phenomenon undoubtedly brings about many challenges to legal doctrine. The profound mutations in the European administrative action are still being conceptualized by lawyers and political scientists, and lack a general, comprehensive legal framework. It poses challenging legal questions and leads to some shortcomings, in particular as this evolution has come hand in hand with neither procedural codification nor substantial change in the judicial architecture of the Union.

From a legal perspective, the main display of this intense cooperation is arguably procedural. The type of procedures emerging from this phenomenon cannot suit with the traditional unidirectional patterns of indirect administration, but are something different still to be elaborated and theorised by jurists. Hence the pertinence of assessing the legal implication of this complex, changing reality of a composite executive action of the EU and national administration.

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<sup>275</sup> Loïc Azoulay, “Gli sviluppi recenti dell’integrazione amministrativa europea attraverso la giurisprudenza Della Corte di Giustizia”, in Stefano Battini and Giulio Vesperini (eds.), *Lezioni di Diritto Amministrativo Europeo*, Guffrè Editore (Milan, 2006), 99-111, at 103.

## CHAPTER 3

### Administrative procedures in the European Union

- 3.1.- Preliminary remarks
- 3.2.- Early historical and academic background of the notion of administrative procedures
  - 3.2.1.- *Scholarly notion of administrative procedures*
  - 3.2.2.- *Early conception of administrative procedures in Europe and in other countries*
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- 3.3.- The concept of administrative procedures in European comparative law
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  - 3.4.4.- *The case law of the Court of Justice and the development of general principles of European administrative procedural law*
  - 3.4.5.- *The codification of administrative procedures in the European Union*
  - 3.4.6.- *Types of administrative procedures from the EU perspective*
- 3.5.- Conclusions

### **3.1.- Preliminary remarks**

The preceding chapter affirmed the existence of a European public administration, but one with peculiar features that evolved from a minute administrative apparatus relying on national administrations to execute its policies to one in which multifaceted cooperation permeates all its activities. In this chapter, a similar academic challenge will be tackled; providing evidence for the existence of administrative procedures at the level of the Union. The assessment will lead to the conclusion that they exist, but also to underlining their special features. Similarly to the trends that have taken place at the national level, the importance and functions of EU administrative procedures have evolved significantly. We are at a critical moment for EU administrative procedures, when debates, long held by the academia, have commenced among legislators aiming at the codification of administrative procedure. As we will see, it entails a great opportunity to correct many of the shortcomings and legal gaps that composite procedures bring about.

The European Court of Justice affirmed from the very first moment in the seminal ruling *Costa / Enel* the autonomy European Union Law<sup>1</sup>, on the premise that it arouse from an independent source of law (*une source autonome*). But this autonomy, still subject to diverse interpretations<sup>2</sup>, does not preclude EU law from resting upon some general categories pertaining to national legal orders. Certain elementary legal notions common to all national legal systems are applied without much elaboration in the European corpus of law<sup>3</sup>.

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<sup>1</sup> EEC law back then. So was stated in the seminal judgement CJEC, Case 6/64 *Costa / ENEL* [1964] ECR 585, when the Court argued that the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.

<sup>2</sup> See for example on the ambiguity of the principle of autonomy both from an external and internal point of view; Jan Willem van Rossem, “The Autonomy of EU Law: More is Less?”, in Ramses A. Wessel and Steven Blockmans (eds.), *Between Autonomy and Dependence. The EU Legal Order under the Influence of International Organisations*, Asser Press (The Hague, 2013), 13-46, at 41.

<sup>3</sup> Luis Ángel Ballesteros Moffa, “Las dimensiones aplicativas el procedimiento administrativo europeo”, in Mercedes Fuertes (ed.), *Un Procedimiento Administrativo para Europa*, Aranzadi (Pamplona, 2012), 189-235, at 190.

If the Union's legal order is based on the cession of sovereignty by Member States, one can logically assume that it exercises its powers in likewise manners. Thus, the administrative powers shall be ruled by similar norms and with similar instruments as the ones that can be extracted out of European comparative administrative law<sup>4</sup>.

Unquestionably, the category of administrative procedure is one of these categories. The notion of administrative procedure, which has experienced a notable evolution in European countries, shall be assessed in the first place, only then will we proceed to analyse whether there procedures that channel the EU administrative action are indeed administrative procedures. Afterwards, the analysis will continue on the nature, features, and shortcomings of the administrative procedures that take place in the EU.

### ***3.2.- Early historical and academic background of the notion of administrative procedures***

#### ***3.2.1.- Scholarly notion of administrative procedures***

As a general term, procedure can be defined simply as “an established way of doing something”<sup>5</sup>. From a legal point of view, that ‘way’ is established by legal rules. It qualifies as administrative as soon as the public administration is involved in the proceedings.

One of the best known classical definitions of administrative procedure is professor Merkl's. To this Austrian administrative law scholar, administrative procedure –*Verwaltungsverfahren*– is the form according to which the activity of the authority takes place<sup>6</sup>. Accordingly, authority and form were regarded as the key

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<sup>4</sup> *Ibid.* at 191.

<sup>5</sup> The Oxford Dictionary of English, Oxford University Press (Oxford, 2010).

<sup>6</sup> Adolf Merkl, *Allgemeines Verwaltungsrecht*, Julius Springer (Vienna, 1969), 213. Merkl's book was first published in 1927 and was since then a work of reference for administrative law authors.



elements, back then an evolution from the old arbitrary rule and the lack of patterns for authorities to make decisions.

A more descriptive academic definition of administrative procedure was later detailed by Italian authors. Massimo Giannini defined administrative procedure as “a combination of acts stemming from administrative authorities, linked to one another and aiming at a single purpose”<sup>7</sup>. The basic initial assumption is thus that administrative procedures are fundamentally aimed at making individual decisions. Even though the previous acts that together conform the administrative procedure, they do not enjoy autonomous legal effects.

The existence and conceptualisation of an administrative procedure was *per se* a major step in the consolidation of the rule of law principle in modern European States, and in the fundamental overhaul of the old relationship between the State and its subjects<sup>8</sup>. Still today, the assessment of compliance, legal certainty and efficiency of administrative procedures remains a key element for the evaluation of the level of respect for the “rule of law” principle in different countries<sup>9</sup>.

However, the idea that citizens enjoyed rights along the procedure constitutes a different assumption and would only come later on. It is not only pertinent to assess whether the decision incumbent upon them was lawful and had been adopted in accordance with the legal procedure, but also that they enjoyed individual rights throughout the process.

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<sup>7</sup> Massimo Severo Giannini, *Diritto Amministrativo*, Vol. II, Giuffrè Editore (Milan, 1970), at 239. This definition is the adaptation to administrative law of the well-known definition of procedure by professor Carnelutti as “a type of combination of acts whose legal effects are causally linked to one another”; Francesco Carnelutti, *Institutiones del Nuevo Proceso Civil Italiano* (Barcelona, 1934), at 74.

<sup>8</sup> Eberhard Schmidt-Aßmann, *Der Rechtsstaat*, in Josef Isensee and Paul Kirchhof (eds.), “Handbuch des Staatsrechts” C.F. Müller Verlag, (Heidelberg, 3<sup>rd</sup> edition, 2004), 541-612.

<sup>9</sup> The Organisation for Economic Cooperation and Development in its aim to promote economic and social development of countries places a high emphasis in the good-working administrative procedural rules. For instance in its SIGMA project, an initiative launched in co-operation with the European Union and primarily addressed to eastern European non-EU member countries, stresses the need to promote legally sound and efficient administrative procedures to avoid the arbitrary use of power and to guarantee legal certainty in public decisions. See, for more information the website <http://www.oecd.org/site/sigma/about/> or more specifically the paper, Kalypso Nicolaidis and Rachel Kleinfeld, “Rethinking Europe’s “Rule of Law” and Enlargement Agenda: The Fundamental Dilemma”, *SIGMA Paper* No. 49, (2012), at 37, available at [http://www.oecd.org/site/sigma/publicationsdocuments/SIGMA\\_SP49\\_061112\\_Eng.pdf](http://www.oecd.org/site/sigma/publicationsdocuments/SIGMA_SP49_061112_Eng.pdf).



The grasp that the exercise of the powers of the state shall be limited to a formal proceeding as a check and a guarantee is intellectually inherent to the postulation of the principle of separation of powers<sup>10</sup>. All the three original powers in the old *Montesquieu's* conception should have a procedure; a legislative procedure, a judicial procedure, and an administrative procedure.

The notion of a judicial due process is very deep rooted in the essence of the rule of law<sup>11</sup>. So is the idea that the parliament shall comply with a procedure in order to enact laws. However, the understanding that administration shall respect a set of steps to carry out its functions was not self-evident, and it was not given much attention. When administrative procedures started to receive such attention, the same principles prevailing in judicial procedures were applied without further elaboration. This lack of attention is explained by the fact that the early conception of administrative procedure was nothing more than a path established by rules to make a lawful decision<sup>12</sup>.

Even when a notion of administrative procedure began to erect and consolidate in European countries throughout the 19<sup>th</sup> Century –not necessarily in terms of codification, but rather through specific regulations–, the idea prevailed that it was nothing more than a formal sequence of acts aimed at a final decision. The central concept was the “administrative act” around which both legal scholarship and the first “administrative judges” –meaning the Councils of State of, for instance, France and

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<sup>10</sup> Charles de Secondat (baron de la Brède et de Montesquieu), *Esprit des lois livres I à V, précédés d'une introduction de l'éditeur*, Delagrave (Paris, 1892), available as electronic book version at <http://www.gutenberg.org/files/27573/27573-h/27573-h.htm>. Montesquieu refers to procedures and procedural rules to limit the three powers in several pages, among others, 158, 186, 187, 221, 237, 261, and 285.

<sup>11</sup> Due process appears in the oldest English tradition as part of the Magna Carta of 1215 (39<sup>th</sup> clause: "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land") and is portrayed by the classical scholar Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, Liberty Fund (Indianapolis 1982) (first published in 1897), as a key element of the rule of law.

<sup>12</sup> Javier Barnes, “Tres generaciones del procedimiento administrativo”, 67 *Derecho PUCP* (2011), 77-108, at 81-82. He argues that the main reason for this lack of attention is that the need for an administrative procedure stemmed only from the claim to protect the rights and interests of citizens. The suitable mechanism to protect one's rights and interests before the decision of the authority is made was indeed the judicial procedure.

Italy– constructed the system of administrative law. Even after administrative activity was already proceduralized; the procedure had no external relevance<sup>13</sup> which, in terms of access to justice meant that only the final administrative act could be contested.

### 3.2.2.- Early conception of administrative procedures in Europe and in other countries

There is an interesting and convergent evolution of the different European legal orders during the 19<sup>th</sup> Century and the first half of the 20<sup>th</sup> Century, but the point of departure are different<sup>14</sup>. Overall, administrative lawyers set their sight on the acts of public administration and the eventual review on them, disregarding proceedings and the internal organisational framework.

The paramount example of this phenomenon is France where, after the revolutionary conception of a state with separation of powers, a new *administration générale de l'État* emerged, radically diverse from what it was under the *ancien régime*<sup>15</sup>, and whose many powers were not even subject to the scrutiny of the judiciary<sup>16</sup>, as they were deemed political acts or *actes de haute politique*<sup>17</sup>. Under the Napoleonic conception of the decisional sovereignty of the executive, the emphasis was given to the free decision of the authority, considering public interest. The previous procedure was no more than a formal sequence lacking external relevance<sup>18</sup>.

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<sup>13</sup> Bernardo Giorgio Mattarella, “Administrative Law In Italy: An Historical Sketch”, 4 *Rivista Trimestrale di Diritto Pubblico* (2010), 1009-54, at 1025.

<sup>14</sup> Sabino Cassese, *La Construction du droit administrative: France et Royaume-Uni*, Montchrestien (Paris, 2000), at 10.

<sup>15</sup> Bernardo Sordi, “*Révolution, Rechtsstaat*, and the Rule of Law: historical reflections on the emergence of administrative law in Europe”, Susan Rose-Ackerman, and Peter L. Lindseth (eds.) *Comparative Administrative Law*, Edward Elgar Publishing (Cheltenham, 2010), 23-37, at 27.

<sup>16</sup> Fabio Rugge, “Administrative Traditions in Western Europe”, in Guy Peters and Jon Pierre (eds.), *Handbook of Public Administration*, Sage Publications (Thousand Oaks, CA, 2003), 177-91, at 187.

<sup>17</sup> Such was the terminology used by the very first case law of the *Conseil d'État*; but there was an evolution from the initial case *Lafitte* (1822); where it stated that government acts are not susceptible of being challenged before any administrative jurisdiction to the case *Prince Napoleon* (1875), where it restricts the notion of political acts to those government acts that concern government's relations with the legislative power or are relative to international relations. See, *Prince Napoleon*, opinion of 19 February 1975, 46707, published in ‘recueil Lebon’ and accessible at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007633029&dateTexte=>

<sup>18</sup> Michel Fromont, *Droit Administratif des États européens*, Themis (Paris, 2006), at 17.

Well into the 20<sup>th</sup> Century, it was considered that whatever preceded or surrounded the act was of the exclusive incumbency of the administration, as the case *Dame Cachet* illustrated very well. In that case of 1922, the *Conseil d'État* accepted the withdrawal, even with procedural breaches, of a previous decision granting rights because the closing act was rightful in substance<sup>19</sup>.

In Italy, the establishment of administrative structures was contemporary with the birth of the modern nation-state in the late 19<sup>th</sup> century. Soon after the foundation of the Italian State, administrative activity gradually became more formalized and took on regular procedures, but these were based on the internal policies of the administrations rather than external norms<sup>20</sup>. Even after subsequent codification and the work of the *Consiglio dello Stato* in the 20<sup>th</sup> Century, the notorious scholar Giannini still in the mid-20<sup>th</sup> Century asserted that the administrative act alone was the moment of precise clarification of the relationship between liberty and authority<sup>21</sup>.

A similar thinking was originally prevalent in Germany, where administrative procedure was deemed merely a serving function to the purpose of reaching a legally correct decision<sup>22</sup>. The introduction of substantial review on the procedure and the assessment of respect for fundamental rights during an administrative procedure came only after the *Grundgesetz* of 1949<sup>23</sup> in the Federal Republic.

Meanwhile, the first codifications started in some other countries. The first general law on administrative procedure in Europe<sup>24</sup>, Spain's law of 1889 did not aim at setting a general procedure valid for all areas where the public administration acted,

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<sup>19</sup> *Dame Cachet*, opinion of 3 November 1922, 74010, published in 'Recueil Lebon' and available at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007635804&dateTexte=>

<sup>20</sup> Mattarella, "Administrative Law In Italy...", at 1013.

<sup>21</sup> Massimo Severo Giannini, *Lezioni di diritto amministrativo*, Vol. I, Giuffrè Editore (Milan, 1950), 290; cited by Mattarella, "Administrative Law In Italy...", at 1025.

<sup>22</sup> Rainer Wahl, *Herausforderungen und Antworten: das öffentliche Recht der letzten fünf Jahrzehnte*, De Gruyter (Berlin, 2006), at 20.

<sup>23</sup> *Ibid.*

<sup>24</sup> The Spanish law is not generally considered the first general act on administrative procedure, perhaps in view that the Spanish law was very short and rather than a legal code, a decree that ordered to all ministries to enact diverse rules taking into consideration eighteen so called bases.

but rather at setting up the bases according to which all the ministry-specific rules would be subsequently enacted<sup>25</sup>. Hence, it was primarily a framework law whose provisions covered elements of the sequence such as deadlines<sup>26</sup>, the reports to elaborate the resolution<sup>27</sup>, the draft resolution<sup>28</sup>, and even the right of the individual to be heard<sup>29</sup>, but still the gist of the law was to regulate the basic aspects to reach a legal and sound resolution<sup>30</sup>. This law, while innovative and visionary, was insufficient and generated a situation where every department and ministry had its own procedural arrangements, to the detriment of the citizen but also to the efficiency of the public administration. The law of 1889 was only an embryo of a true codification because, because it did not avoid fragmentation, and it was unable to articulate effectively general principles of the administrative procedure<sup>31</sup>. A new law was enacted in 1958<sup>32</sup> to correct these shortcomings, simplifying and homogenising administrative procedures. This law would be praised for its simplicity and its efficiency, being a powerful source of inspiration for several Latin American countries in their own administrative codifications<sup>33</sup>. The need to adapt to the decentralisation of the State after the democratic Constitution of 1978 motivated the abrogation of the law of 1958 and the enactment of a new law in 1992<sup>34</sup>, which would gravitate around the same procedural principles.

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<sup>25</sup> Francisco González Navarro, "El Cincuentenario de la Ley de Procedimiento Administrativo de 17 de Julio de 1958", 17 *Revista General de Derecho Administrativo* (2008), 1-499, at 282-88.

<sup>26</sup> Act of 19 October 1889 (Ley de 19 de octubre de 1889 disponiendo que por cada Ministerio se haga y publique un reglamento de procedimiento administrativo para las dependencias centrales, provinciales y locales del mismo); published in Gaceta de Madrid nº 298 of 25 October 1889. Bases six and eight.

<sup>27</sup> Basis five.

<sup>28</sup> Bases three and four.

<sup>29</sup> Basis ten.

<sup>30</sup> Such were the words of the sponsor of the act Gumersindo Azcárate, whose name is generally used by Spanish legal scholarship to refer to the law, and that are included in the foreword of the law.

<sup>31</sup> Francisco López Menudo, "Los principios generales del procedimiento administrativo", 128 *Revista de Administración Pública* (1992), 19-76, at 41.

<sup>32</sup> Act of 17 July 1958 on the Administrative Procedure (Ley de 17 de julio de 1958, de Procedimiento Administrativo) published in the Official Journal of 18 July 1958.

<sup>33</sup> Eduardo García de Enterría, "Un punto de vista sobre la nueva Ley de régimen jurídico de las administraciones públicas y de procedimiento administrativo común de 1992", 130 *Revista de Administración Pública* (1993), 205-19, at 205.

<sup>34</sup> Spanish Common Procedural Act of 26 November 1992 (Ley 30/1992, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común; BOE 285 of 27 November 1992).

Austria's law of general administrative procedure is considered by many commentators the first actual general law on administrative procedure<sup>35</sup>. Even when its main objective was the internal functioning of the administrative bodies in the framework of an authoritarian regime, the legal formalism of the law was valuable from the perspective of the procedural guarantees it provided for the citizen<sup>36</sup>.

Poland also had a long tradition of administrative codification, not only did it enact one of the earliest codes of administrative procedure in 1928, but also the Polish Constitution of 1921 was avant-garde in providing for certain principles of the administrative procedure<sup>37</sup>.

The Anglo-Saxon tradition departs from very different origins than continental Europe, as the reliance of the system on procedural principles in judging the lawfulness of administrative action was present earlier than in continental Europe, more focused on substantial aspects<sup>38</sup>.

As early as in the mid-19<sup>th</sup> Century the English courts already established some procedural rights of individuals *vis-à-vis* the action of public authorities. In the often cited ruling *Cooper / Board of Works* of 1863<sup>39</sup> the justice of the common law offered the citizen the same procedural rights, in this case the right to be heard, as in a judicial *due process of law*. The equalization of procedural rights of the citizen in an administrative procedure and in a judicial process had its acme a century later when

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<sup>35</sup> Fromont, *Droit administrative des États...*, at 212.

<sup>36</sup> Jaques Ziller, "The Continental System of Administrative Justice", in Guy Peters and Jon Pierre (eds.), *Handbook of Public Administration*, Sage Publications (Thousand Oaks, CA, 2003), 323-32, at 324.

<sup>37</sup> These were the statutory regulation of judicial review of administrative decisions and the principle of two instances in administrative procedure. See further Agnieszka Korzeniowska, "Administrative Procedure" in Anna Wyrozumska (ed.), *Introduction to Polish Law*, Łódź University Press (Łódź, 2005), 129-49.

<sup>38</sup> Francesca Bignami, "Comparative Administrative law", in Nauro Bussani and Ugo Mattei, *The Cambridge Companion to Comparative Law*, Cambridge University Press (Cambridge, 2012), 145-70, at 155.

<sup>39</sup> *Cooper / Board of Works* (1863) 14 CB (NS) 180, 182. An individual had started to build a house without giving in due time notice to the Board of Works. In cases of such breach, the state provided for such works to be demolished. The Board, without any other proceedings, had the house razed to the ground. The judge considered such demolition unlawful because, even if not provided by the statute, the citizens enjoyed by virtue of common law, the right to be heard.

the Tribunal and Inquiries act<sup>40</sup> was passed in 1958. It required courts to give reasons for decisions, but this translated in all public authorities being obliged to give reasons and thus to allow for a much wide scrutiny of the public administration by the judges later on<sup>41</sup>.

Even with those differences from continental Europe, in a common law system hardly prone to legal revolutions, the evolution of the conception of administrative procedures entails important affinities<sup>42</sup>. Legal concerns relative to the expansion of administrative action during the 19<sup>th</sup> Century were similar; *i. e.* how to guarantee citizens' rights from the increasing powers of the public administration. According to the British frame of reference, decision of the administrative authority could be reviewed by the ordinary courts<sup>43</sup>, but in the case-law of those courts there was a trend towards a more protective stance on individual rights. The Common law judges have been careful in requiring public authorities to exercise their discretionary power in a structured fashion<sup>44</sup> and have blocked attempts to escape judicial review of administrative decisions<sup>45</sup>.

In conclusion, the evolution of administrative procedure as a key element in administrative law emerged from the same premise that the public administration shall be subject to the law<sup>46</sup>, though the standard of privileges for the public administration was generally lower in common law systems.

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<sup>40</sup> Tribunals and Enquiries Act of 1 August 1958, subsequently re-enacted in 1971 and 1992.

<sup>41</sup> On the obligation of public administration to give reasons, *Ridge / Balwin* [1964] AC 40 and, later on, with a detailed analysis on the influence of the Act in the case-law, *R / IRC (ex parte Federation of Self Employed and Small Business)* [1982] AC 617.

<sup>42</sup> Jaques Ziller, “¿Es necesaria una ley de procedimiento administrativo par las instituciones de la Unión? Comentarios preliminares y perspectivas”, in Mercedes Fuertes López (ed.), *Un Procedimiento Administrativo para Europa*, Aranzadi (Pamplona, 2012), 97-130, at 106.

<sup>43</sup> Rugge, “Administrative Traditions in Western...”, at 187.

<sup>44</sup> *Padfield / Minister of Agriculture, Fisheries and Food* [1968] AC 997.

<sup>45</sup> *Anisminic Ltd / Foreign Compensation Commission* [1969] 2 AC 147.

<sup>46</sup> Ziller, “¿Es necesaria una ley ...”, 105.

Outside Europe, the evolution in the United States is also very illustrative. A traditionally reluctant country to the intervention of public power in social life<sup>47</sup>, the emergence of administrative law came relatively late to the United States<sup>48</sup>. In spite of the proliferation of independent agencies during the 1930's as part of the New Deal policies, few aspects of an increasing administrative action had been proceduralised in a homogeneous fashion, leading to potential risks in the rights of citizens<sup>49</sup>. Hence, following an examination of administrative functioning after the setting up of the new agencies, the imperative need found for standardised administrative procedures<sup>50</sup> prompted the approval of the Administrative Procedure Act of 1946<sup>51</sup>.

Unlike in Europe, United States agencies are unique in the sense that they hold powers pertaining to all three branches of the federal government: judicial, legislative and executive; which created major constitutional concerns in its time<sup>52</sup>. The need for a procedure stemmed, first and foremost, from the fact that some of those agencies had judicial or quasi-judicial powers<sup>53</sup>. In that sense, there are many affinities between the administrative procedure and the judicial process.

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<sup>47</sup> Larry Lutton, "Administrative State and Society: A Case Study of the United States of America", in Guy Peters and Jon Pierre (eds.), *Handbook of Public Administration*, Sage Publications (Thousand Oaks, CA, 2003), 169-176, at 169.

<sup>48</sup> Edward L. Metzler, "The Growth and Development of Administrative Law", 19(4) *Marquette Law Review* (1935), 209-227; carries out an analysis on the early development of American administrative law, which is explained mainly because of the inadequacy of the old common law to cope with the challenges of the expanding economic and social life in the United States.

<sup>49</sup> Daniel E. Hall, *Administrative Law: Bureaucracy in a Democracy*, Pearson Prentice Hall (New York, 2011), 2.

<sup>50</sup> See Walter Gellhorn, "The Administrative Procedure Act: The Beginnings", 72 *Virginia Law Review* (1986), 219-33. This article describes the drafting process, whose main difficulties were in the balance between the necessary homogeneity of the act and the inherent differences of the processes and bodies that were going to fall with the scope of the APA. The result was so satisfactory that no dissent was recorded in Congress.

<sup>51</sup> Administrative Procedure Act, Public Law 79-404, 60 Stat. 237, enacted 11 June 1946.

<sup>52</sup> Those concerns were overcome thanks to a deferent judicature during the New Deal era (like the Supreme Court case *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935)) on the grounds that legislative power was delegated to the agencies by the Congress according to article 1(8) of the US Constitution and that there was a clear-cut separation between adjudicating and prosecutorial functions. See further Alfred C. Aman, *Administrative Law and Process: Cases and Materials*, LexisNexis/Matthew Bender (Albany, NY, 2006), at 140.

<sup>53</sup> Roscoe Pound, *Administrative Law: Its Growth, Procedure, and Significance*, Davis & Ward (Pittsburg, PA, 1942), at 57.



The administrative procedure act does more than establishing a general administrative procedure. It sets up a legal framework with checks, balances, and public information and participation in the agencies' functioning<sup>54</sup>, but it also establishes uniform standards for the conduct of formal rulemaking and adjudication. This statute already goes further than providing for a formal path to make lawful decisions by the administration, and it covers rulemaking competences too. There is even a visionary third section of the law that concerns administrative actions different from adjudication and rulemaking, but in this area the level of proceduralisation was very low<sup>55</sup>.

The United States is thus an example on how the enlargement of executive action calls for a standardisation of decisional processes. Paradoxically this phenomenon was introduced by means of legislation in a common law country, whereas in the paramount representative of administrative law, France, the relevance of administrative procedure came thanks to the case-law of the *Conseil d'État*.

In conclusion, there is a certain convergence common law countries and civil law countries in terms of the proceduralisation of administrative action<sup>56</sup>; but in all cases it was not until well into the mid-20<sup>th</sup> Century that administrative procedure was considered more than the mere sequence of formalities to reach a decision by the competent authority.

The sum and substance of this short oversight is that the notion that administrative procedures should be regulated or, what is more, that individual procedural rights could be breached, was not self-evident and came relatively late to some European countries with long administrative law traditions. And even then, the focus was primarily on the final decision. The objective was to limit the administration's discretionary powers and ensure that decisions affecting citizens

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<sup>54</sup> The meaning of agency is substantially wider than what is understood under EU terminology, and it covers under the administrative procedure act provisions "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" with the exception of several enumerated authorities, including the Congress, federal courts, and governments of territories or possessions of the United States.

<sup>55</sup> Martin Shapiro, "APA: Past, Present, Future", 72 *Virginia Law Review* (1986), 447-92, at 447.

<sup>56</sup> Ziller, "¿Es necesaria una ley...", at 105-106.



were lawful, so procedure was no more than a tool to reach this objective. This conception is what some authors refer to as the first generation of administrative procedures<sup>57</sup>; characterised by: (a) an individual decision as an objective; (b) a subordinated function to substantive law; (c) a merely procedural vision of the different phases; and (d) procedure as a decision-making process. There is thus an evolution in the importance attached to administrative procedures and, in particular, the judicial reviewability of the different steps leading to the final decision.

Resulting from this short overview, we can deduct that the first and traditional approach to administrative procedure is insufficient –judging by the current standards– in terms of effective judicial protection. The conception of individual procedural rights has changed dramatically. In truth, the idea that those rights are incardinated in administrative procedures as we see them nowadays, as a key element for a public administration deferential to the rule of law principle, has not been self-evident and results from the following evolution.

### *3.2.3.- The evolution towards a more central role of administrative procedures*

Since the decade of the 1950's, a new vast field of competences for public administrations began to emerge and gain attention; that of rulemaking powers. In this field, the rule of law principle implied in a more visible manner that public administrations not only had to make rightful regulations, but they had to elaborate them in the rightful way; *i. e.*, it mattered not only *what* but also *how*.

In the mid-20<sup>th</sup> Century there was a smooth but visible change of paradigm from the conception of the clear dichotomy between the creation of laws –most frequently containing mandates or prohibitions only– and the application thereof, in which it is generally considered that discretion is to be as restricted as possible<sup>58</sup>. The formerly clear distinction between law-making and law-executing powers dissipates<sup>59</sup>.

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<sup>57</sup> Barnes, “Tres generaciones ...”, at 83.

<sup>58</sup> Javier Barnes, “Reforma e innovación del procedimiento administrativo”, in Javier Barnes (ed.), *Transforming Administrative Procedure*, Global Law Press (Seville, 2008), 1-46, at 31.

<sup>59</sup> Barnes, “Tres generaciones ...”, 92.

This phenomenon had different consequences but one of them is the enhancement of administrative procedures.

As previously explained, out of the two grand sample procedures for State functions already existing, judicial procedure and legislative procedure, the original administrative procedure resembled more the former than the later because it aimed at taking the correct decision, just like in a judicial process. In many ways, however, the rules on legislative procedure were inappropriate for the public administration<sup>60</sup>, making it advisable to adopt new autonomous rules.

The competence of public administrations to enact rules of general application was not unseen, but it was only from the 1950's that it expanded so greatly that it was essential to proceduralise these powers, so that first of all, citizens' rights were respected and, second of all, there was a way to accommodate legitimate interests and rights of individuals throughout the process.

This was particularly the case in the United States<sup>61</sup>, where the administrative procedure act of 1946 was pioneer in setting up a general legal framework of administrative rulemaking procedures. When it comes to the rulemaking procedures, the Supreme Court soon deducted that the administrative procedure was more than a mere formality; it was a guarantee which assured fairness and mature consideration of rules of general application<sup>62</sup>, as it stated in its famous ruling *NLRB v. Wyman-Gordon Co*<sup>63</sup>. Under that premise, American courts acknowledged more generally,

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<sup>60</sup> Barnes, "Tres generaciones ...", 89.

<sup>61</sup> See more on the emergence of the regulatory state in the United States and the relevance of the administrative procedure act in Marc Law and Sukkoo Kim, "The Rise of the American Regulatory State: A View From the Progressive Era", in David Levi-Faur (ed.) *Handbook on the Politics of Regulation*, Edward Elgar publishing (Cheltenham, 2011), 113-28.

<sup>62</sup> The enactment of administrative rules of general application became the most relevant activity of the newly created agencies of the 1960's and 1970's during what American scholars call the environmental era, thanks in part to the large interpretation of delegation by the American courts that provided ample discretionary powers to the agencies; as an example in the Supreme Court case *Chevron v. NRDC*, 467 U.S. 837 (1984). See Alfred C. Aman and William T. Mayton, *Administrative Law*, West Group (Saint Paul, MN, 2001), at 190-202.

<sup>63</sup> *NLRB v. Wyman-Gordon Co.*, judgement of 23 April 1969, 394 U.S. 759 (1969), at 764. See further Edward R. Leahy, "Rule-Making and Adjudication in Administrative Policy Making: *NLRB v. Wyman-Gordon Co.*", 11(1)(1) *Boston College Law Review* (1969), 64-76, available at <http://lawdigitalcommons.bc.edu/bclr/vol11/iss1/5>

also in single-case decision making processes, that all public authorities shall adhere to the established administrative procedure, even if intended as internal rules<sup>64</sup>.

In France, it was the Constitution of 1958<sup>65</sup> that recognised a wide rule-making power of the government even without delegation of the legislature, which, still today, remains as one of the widest rule-making powers endowed to a government in Europe<sup>66</sup>. In a similar fashion to single-case decision procedures, there was hardly any codification in France for a general procedure to exercise this autonomous *pouvoir réglementaire*. But in the field of rule-making procedures, it was soon evident that procedures could not be considered a mere formality, in particular as they increasingly incorporated citizens' right of participation<sup>67</sup>.

However, by then, the *Conseil d'État* had already departed from its own former doctrine, where the administrative act was the sole centre of attention, and had looked at the administrative procedure without the glasses of the final *acte administratif*. The seminal case in this evolution was *Dame veuve Trompier-Gravier*<sup>68</sup> when the *Conseil d'État* stated that the reviewability of an act included the procedure through which the act had been created. It was a revolutionary statement as late as

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<sup>64</sup> Lucas v. Hodge, 730 F.2d 1493, 235 U.S.App.D.C. 63, "it is a familiar principle of federal administrative law that agencies may be bound by their own substantive and procedural rules and policies, whether or not published in the Federal Register, if they are intended as mandatory", quoted in Theodora Ziamou, "Public Participation in Administrative Rulemaking: The Legal Tradition and Perspective in the American and European (English, German, Greek) Legal Systems", 60 (1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 41-102, at 45.

<sup>65</sup> Article 37 of the French Constitution of 4 October 1958:

"Matters other than those coming under the scope of statute law shall be matters for regulation.

Provisions of statutory origin enacted in such matters may be amended by decree issued after consultation with the *Conseil d'État*. Any such provisions passed after the coming into force of the Constitution shall be amended by decree only if the Constitutional Council has found that they are matters for regulation as defined in the foregoing paragraph."

Rule-making powers are endowed not only to the Council of Ministers, but also to the Prime Minister, the President of the Republic, and certain independent administrative authorities.

<sup>66</sup> Bernard Schwartz, *French Administrative Law And the Common-law World*, LawBook Exchange (Clark, NJ, 2006), at 89.

<sup>67</sup> Jaques Chevalier, "L'Administration face au public", in Jaques Chevalier *et al.*, *La communication administration-administrés*, PUF (Paris, 1983), 21-76, at 37.

<sup>68</sup> In the *Dame veuve Trompier-Gravier*, opinion of 5 May 1944, 69751, published in 'recueil Lebon' and accessible at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007636208&dateTexte=>, the *Conseil d'État* stated that the fact that the interested party was denied any right to be heard during a proceeding for the removal of an authorisation rendered the decision void.

1944. The *Conseil d'État* further enhanced the relevance of administrative procedure by focusing on some of the citizens' rights thorough the procedure, like the right of access to administrative documents<sup>69</sup>.

In that sense, the lack of codification of the administrative procedure in France that still persists today –what French administrative legal scholarship calls “*immaturité procédurale*”<sup>70</sup>– was compatible with the development of a more central conception of administrative procedure.

With a much narrower scope than the French constitution, the German Basic Law also provides for rulemaking powers of the administration but only in the framework of delegation from the legislative powers<sup>71</sup>. The German Administrative Procedure act does not address administrative rulemaking procedures, and there is no act of general scope in this regard<sup>72</sup>, but in many fields the elaboration of rules of general application –like environmental protection<sup>73</sup> of urban planning<sup>74</sup>–, statutes ensure participation and other rights of individuals. The case law of German administrative courts has evolved to the point where procedural breaches during rulemaking processes often affect the validity of the regulations enacted<sup>75</sup>.

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<sup>69</sup>The *Conseil d'État* has developed other rights throughout the administrative procedure like the right of access to documents in *Ullmann*, opinion of 29 April 2002, 228830, published in “recueil Lebon” and accessible at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT00008112306&fastReqId=580028170&fastPos=1>.

<sup>70</sup> Michel Fromont, *Analyse comparée du droit administratif : la procédure administrative non contentieuse en droit français*, Esperia (London, 2000), at 74.

<sup>71</sup> Article 80 of the German Basic Law (*Grundgesetz für die Bundesrepublik Deutschland* of 23 May 1949) is considered the legal foundation of the rulemaking power of the government, and reads: “The Federal Government, a Federal Minister or the Land governments may be authorised by a law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis. If the law provides that such authority may be further delegated, such subdelegation shall be effected by statutory instrument.”

<sup>72</sup> Hartmut Maurer, *Allgemeines Verwaltungsrecht*, Beck (Munich, 1999), 617.

<sup>73</sup> For instance, article 29(1) of the Federal Nature Protection Act (*Bundesnaturschutzgesetz* of 12 March 1987) Bundesgesetzblatt 1987 I, 889.

<sup>74</sup> For example, article 3(1) of the Federal Building Code (*Bekanntmachung der Neufassung des Baugesetzbuchs* of 27 August 1997) Bundesgesetzblatt 1997 I, 2141.

<sup>75</sup> A general overview of the consequences of procedural breaches during rulemaking procedures can be found in Hermann Hill, *Das fehlerhafte Verfahren und seine Folgen im Verwaltungsrecht*, Decker (Heidelberg, 1986), 66.

Notwithstanding, the key element in Germany was bestowed by the Federal Constitutional Court. In its ruling of *Mülheim-Kärlich*<sup>76</sup> it stated that fundamental rights –an essential element not only of Germany’s Constitution but also German legal conscience– must also inspire administrative procedural law as a guarantee to the citizens concerned.

A similar trend can be observed in Italy, where in certain fields prone to be subject of administrative regulations participation rights have been introduced therefore increasing the importance of procedure<sup>77</sup>.

In English law, consultation to interested groups and individuals in administrative regulation has been introduced on the basis of custom rather than a general legislative provision<sup>78</sup>. However, English courts have progressively set up the common law authority on the basis of the principle of legitimate expectations that public consultation as part of the decisional procedure shall be respected<sup>79</sup>. Recent case-law of the English judges have contributed to the recognition of consultation and other participatory rights in the policy and rule-making processes<sup>80</sup>. The distinction between individual and general acts lacks major consequences in Britain as the law of administrative acts is above all a law on the procedure, not on the substance, and the key element has always been whether a due procedure has been followed.

An important evolution in the trend towards the enshrinement of administrative procedures was the recognition of some procedural rights to individuals in the new constitutions of some European states. Constitutions adopted in the 1970’s in the aftermath of authoritarian regimes added new rights to traditional civil and political rights. Such rights concerned the relationship between individuals

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<sup>76</sup> Judgement of the German Federal Constitutional Court *Bundesverfassungsgerichtsentscheidung ‘Mülheim-Kärlich’* Beschluß BVerfGE 53, 30 of 20 December 1979.

<sup>77</sup> Bernardo Giorgio Mattarella, “Participation in rulemaking in Italy”, 2 *Italian Journal of Public Law* (2010), 339-351, at 341.

<sup>78</sup> Ziamou, “Public Participation in Administrative ...”, 80.

<sup>79</sup> See case law cited in Ziamou, “Public Participation in Administrative ...”, 80, in particular, *R. v. Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators’ Association* [1972] 2 Q.B. 299.

<sup>80</sup> *R(Greenpeace) / Industry Secretary* [2007] EWHC 311; and *R(Luton BC and Nottingham CC) / Education Secretary* [2011] EWHC 217.

and the government, thus it was deemed essential to ensure legal protection of citizens against the government<sup>81</sup>.

In Portugal, the Constitution of 1974 mandates that the law on administrative activity proceedings to ensure the participation of concerned citizens<sup>82</sup>. The Greek Constitution of 1975, also provides for individual procedural rights before the administration, notably the right to a prior hearing in administrative procedures of one's concern<sup>83</sup> and, more generally, the right to information<sup>84</sup>.

In Spain, the Constitution of 1978 contains specific provisions regarding individual rights in the administrative procedure, such as the right of participation, access to files, and prior hearing<sup>85</sup>. The Spanish Constitutional Court outspokenly recorded an evolution in a ruling of 1995<sup>86</sup> when it admitted that:

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<sup>81</sup> Giacinto della Cananea, "Administrative Procedures and Rights in Italy: A comparative approach", 2(2) *Italian Journal of Public Law* (2010), 207-14, at 207.

<sup>82</sup> Article 267 of the Portuguese constitution of 2 April 1976 reads:

"Administrative activity proceedings shall be the subject matter of a special law, which shall ensure the rationalisation of resources to be used by the administrative services and the participation of citizens in the making of the decisions that concern them."

The act adopted to implement that provision is the Administrative Procedure Code, Decree-Law 442/91 of 15 November 1991. See further João Martins Claro, "Administrative Procedure: the Portuguese case", SIGMA Papers (2006), available at <http://www.oecd.org/countries/serbiaandmontenegro/june2006/35937379.pdf>

<sup>83</sup> Article 20(2) of the Greek constitution of 11 June 1975 reads:

"The right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests."

<sup>84</sup> Article 5 A of the Greek constitution of 11 June 1975, as amended in 2001, reads:

"All persons have the right to information, as specified by law. Restrictions to this right may be imposed by law only insofar as they are absolutely necessary and justified for reasons of national security, of combating crime or of protecting rights and interests of third parties."

<sup>85</sup> Article 105 of the Spanish constitution of 27 December 1978 reads:

"The law shall make provision for: a) The hearing of citizens, directly, or through the organizations and associations recognised by the law, in the process of drawing up the administrative provisions which affect them. b) The access of citizens to administrative files and records, except to the extent that they may concern the security and defence of the State, the investigation of crimes and the privacy of persons. c) The procedures for the taking of administrative action, with due safeguards for the hearing of interested parties when appropriate."

The law enacting such provision is the Law on the legal regime of public administrations and common administrative procedure (*Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*); BOE 285 de 27 de noviembre de 1992.

<sup>86</sup> Judgement 136/1995, of 25 September 1995 (BOE 246 of 14 October 1995), paragraph 3.

*“The administrative jurisdiction can no longer be considered a channel of control of legality from an objective perspective, i. e. as a process surrounding the administrative act only. It is essentially a means to enforce the right of judicial review of the interests and substantive rights of the citizens.”*

Newer constitutions in Eastern Europe also incorporate individual rights that enhance the constitutional dimension of administrative procedures. The Polish constitution of 1997 provides for rights of access to information, privacy, and access to documents much in detail<sup>87</sup>. Similarly, the Czech Charter of fundamental rights and basic freedoms of 1992 imposes a mandate on the administration to provide relevant information to concerned citizens<sup>88</sup>.

The concern about the relevance of administrative procedure eventually transcended at the international level, notably at the level of the Council of Europe. The European-wide acknowledgement of the major role of administrative procedures with regard to the rights of individuals vis-à-vis public administration had a critical point with the Resolution (77) 31 of the Council of Europe on the protection of the

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<sup>87</sup> Article 51 of the Polish Constitution of 2 April 1997 reads:

“No one may be obliged, except on the basis of statute, to disclose information concerning his person. Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law.

Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute.

Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute.

Principles and procedures for collection of and access to information shall be specified by statute.”

Article 61 of the Polish Constitution of 2 April 1997 reads:

“A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.

The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings.”

<sup>88</sup> Article 17(5) of the Charter of Fundamental Rights and Basic Freedoms of 16 December 1992 reads:

“State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore and the implementation thereof shall be provided for by law.”



individual in relation to the acts of administrative authorities<sup>89</sup>. Among other provisions, it stated that the concerned person had the right to be heard<sup>90</sup>, and the right of access to information<sup>91</sup>, while the administration was obliged to state the reasons of its decision<sup>92</sup>, and to indicate the remedies against the resolution and the time limits for its exercise<sup>93</sup>.

The trend towards proceduralisation of administrative action was confirmed by other statements such as the Recommendation (80)2 concerning the Exercise of discretionary Powers by administrative Authorities<sup>94</sup>; the Recommendation (87)16 on administrative procedures affecting a large number of persons<sup>95</sup>; and the Recommendation (91)1 on administrative sanctions<sup>96</sup>.

At the European Union level, the progression to the inclusion of participation, public information and other citizens' rights in the administrative procedures has been enhanced by several EU directives particularly in the field of environmental protection<sup>97</sup>.

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<sup>89</sup> Adopted by the Committee of Ministers on 28 September 1977, at the 275th meeting of the Ministers' Deputies; available at [http://www.coe.int/t/dghl/standardsetting/cdcj/administrative%20law/documents\\_EN.asp](http://www.coe.int/t/dghl/standardsetting/cdcj/administrative%20law/documents_EN.asp)

<sup>90</sup> Article I.

<sup>91</sup> Article II.

<sup>92</sup> Article IV.

<sup>93</sup> Article V.

<sup>94</sup> Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies, available at <https://wcd.coe.int/ViewDoc.jsp?id=678043&Site=COE>

<sup>95</sup> Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=608104&SecMode=1&DocId=694390&Usage=2>

<sup>96</sup> Adopted by the Committee of Ministers on 13 February 1991 at the 452nd meeting of the Ministers' Deputies, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2011123&SecMode=1&DocId=392992&Usage=2>

<sup>97</sup> For example: Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC ( OJ 2003 L 156, 17–25); Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (OJ 2003 L 4126–32); and Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, 1–73).



A general consensus emerged progressively in legal scholarship on the central role of administrative procedure. In practical terms, administrative procedures gained two sets of functions<sup>98</sup>:

- Noninstrumental functions, which are new with respect to the previous situation inasmuch as they entail that administrative procedure plays a role by itself without being linked to the final decision that is its output. These functions are the promotion of citizens' participation at the same time that transparency and accountability are improved. But there are others like, on the side of the citizens, protection of dignity and fundamental rights and, on the side of the public administration, improvement of legitimacy<sup>99</sup>.

- Instrumental functions, which are more visible. Administrative procedures are a legal shield for the protection of individual rights while at the same time a tool for the promotion of good administration, especially if discretionary powers exist<sup>100</sup>.

This trend did not lead to the codification of administrative procedures in all countries, but the laws on administrative procedure have become more and more apt to improve the quality of administrative decision and rule making, as well as to protect individual rights up to a point where some scholar argue that those rights shall be heightened to the category of fundamental rights<sup>101</sup>.

In conclusion, the most remarkable feature in the evolution of administrative procedures in European countries during the second half of the 20<sup>th</sup> Century is the central position that administrative procedures have gained in the possible review of

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<sup>98</sup> Juli Ponce Solé, "Good Administration and Administrative Procedures", 12(2) *Indiana Journal of Global Legal Studies* (2005), 551-88, at 552-53.

<sup>99</sup> Paul Craig, "Procedures and Administrative decision-making: A Common Law Perspective", 5 *European Review of Public Law* (1993), 55-68, cited by Ponce, "Procedures and Administrative...", at 552.

<sup>100</sup> Lord Millett, "The Right to Good Administration in European Law", 47 *Public Law* (2002) 309-22, at 310; cited by Ponce, "Procedures and Administrative...", at 553.

<sup>101</sup> See Klara Kanska, "Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights", 10(3) *European Law Journal* (2004), 296-326; and Anthony Bradley, "Administrative Justice: A Developing Human Right?", 1(3) *European Public Law*, 347-69.

the actions of the public administration. An equally noticeable feature is the end of unilaterality. The participation of citizens in administrative procedures, notably in the context of rulemaking procedures, leads to the further enhancement of administrative procedure *per se*, with an external relevance which may operate, in case of judicial review, autonomously of the final decision. Access to information granted to individuals and interest groups further reinforce the status and private parties and allow for a more comprehensive spectrum of source of information in the decision making process by public authorities. Participation, transparency and accountability have thus become major elements of the activity of public administration by virtue of the enhancement of administrative procedures.

#### *3.2.4.-The pending transformation of administrative procedures*

Recent developments in the widening of the scope of administrative action and the expansion of new administrative mechanisms have left the former definitions of administrative procedures outdated. Administrative procedures cannot be limited to a sequence of acts aiming at a single decision or a rule of general application. In the words of Schmidt-Aßmann, administrative procedure is an “intertwined process carried out by public bodies designed to gather, manage and analyze information”<sup>102</sup>.

The new notion stems from the realization that public administration cannot be exclusively self-reliant, and it has to find mechanisms of cooperation with other public entities and even the private sector<sup>103</sup>. This is particularly true once the policies and actions executed by public administrations fall within the scope of what was previously referred to as “New Governance”<sup>104</sup>, a phenomenon of particular impact in the European Union, but which is widespread in European and North American countries<sup>105</sup>.

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<sup>102</sup> Schmidt-Aßmann, “Structures and functions ...”, at 47.

<sup>103</sup> Barnes, “Tres generaciones...”, at 90. Also, the essay by Alfred C. Aman, “Law, Markets and Democracy: A Role for Law in the Neo-Liberal State”, 51 *New York Law School Law Review* (2006), 800-15; describes some mechanisms that create the democratic means, flows of information, and political processes necessary to enable individuals and stakeholder associations to be engaged in the activities of public actors in a cooperative way.

<sup>104</sup> See section 2.2.2.

<sup>105</sup> Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *Minnesota Law Review* (2004), 262-390, at 277. Again in this point, it is important

A new vision, still in progress, of the administrative procedure starts to emerge as legal scholarship begins to admit that the old schemes are no longer apt for the extension and variety of form of administrative action<sup>106</sup>. Three phenomena, which Javier Barnes calls the opening of the three old borders<sup>107</sup>, are of particular pertinence for this shift of paradigm:

- The former clear-cut distinction between law application and law making has disappeared in many fields, following the confusion between policy formulation and policy execution.
- The separation of the public and private spheres has vanished in many regulatory areas where they are mutually dependent. Public decision-makers search increasingly for the involvement of private actors<sup>108</sup>.
- The division between domestic and international has also become illusory, especially so for the European Union and its Member States.

Along these lines, administrative action is increasingly complex and unsuitable for a legal analysis with the sole traditional notion of administrative procedure. Hierarchies and centralization, always though as the frame of reference for an administrative procedure are not necessarily present in many policy areas, and the limited schemes of private participation are often insufficient for the amount and complexity of information needed to carry out new policies.

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to stress that the United States's administrative procedure act anticipated the importance of informal ways of administrative action in its third part.

<sup>106</sup> Graíne de Búrca and Joanne Scott, "Introduction: New Governance, Law and Constitutionalism", in Graíne de Búrca and Joanne Scott (eds.) *Law and New Governance in the EU and the US*, Hart Publishing, (Oxford and Portland, OR, 2006), 1-27, at 9.

<sup>107</sup> Barnes, "Tres generaciones...", at 91.

<sup>108</sup> An example of this feature, at the EU level but extensible to many countries is the Interinstitutional Agreement on better law-making (2003/C 321/01) OJ 2003 C 321, 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0001:EN:PDF>; in particular in article 18 to 23.

The end of unilaterality formerly highlighted is currently experiencing a new stage. It happens not only to include citizens' rights, but also because the public authorities are increasingly in need of cooperation from other public administrations and stakeholders in the private sector. This feature, even more visible in the EU than at the national level, shall lead to a new vision of administrative procedures that still has to be legally assessed and conceptualized<sup>109</sup>.

In conclusion, the notion of administrative procedures from a comparative perspective has experienced a manifest evolution from the insignificance of a formal sequence aimed at producing the key element of 'administrative acts' to a central role in the control by individuals of the execution of administrative action, with and increasing participation of citizens. Judicial and scholar deference to substantive outcomes in the past has been counterbalanced by a strict procedural review which, at the European Union level has been embraced by the Court of Justice particularly by three recent rulings<sup>110</sup>, which will be analysed later on<sup>111</sup>: *Vodafone*<sup>112</sup>, *Volker und Markus Schelke*<sup>113</sup> and *Test-Achats*<sup>114</sup>.

Today, this recent development is accompanied by the uptake of New Governance approaches, which has a remarkable influx in the relations EU – national public administrations.

### ***3.3.- The concept of administrative procedures in European comparative law***

#### ***3.3.1.-Diverse approaches regarding the codification of administrative procedures***

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<sup>109</sup> Mark Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy*, Cambridge University Press (Cambridge, 2011), at 22.

<sup>110</sup> Koen Lenaerts, "The European Court of Justice and Process-oriented Review", 1 *Research Papers in Law of the College of Europe* (2012), at 3, available at [http://www.coleurope.eu/sites/default/files/research-paper/researchpaper\\_1\\_2012\\_lenaerts\\_final.pdf](http://www.coleurope.eu/sites/default/files/research-paper/researchpaper_1_2012_lenaerts_final.pdf).

<sup>111</sup> See at the end of Section 3.4.4.

<sup>112</sup> C-58/08 *Vodafone and Others*, [2010] ECR I- 4999 .

<sup>113</sup> Joined Cases C-92 and 93/09 *Volker und Markus Schecke GbR*, [2010] ECR I-11063.

<sup>114</sup> Case C-236/09 *Association belge des Consommateurs Test-Achats and Others*, [2011] ECR I-773.

Before analysing the current state-of-affairs regarding the administrative procedures at the EU level, an overview of the different national conceptions of administrative procedures provides certain clues.

As previously revealed, there is a convergent trend in the evolution of the notion and legal effects of administrative procedures in most European countries. The enhancement from a legal perspective of administrative procedures has resulted in the enactment of national acts or codes intending to be of general application. There is also a trend to the recognition of more and more procedural rights to individuals, which is visible in the newer acts or the recent amendments to some of those acts<sup>115</sup>.

However, the legal framework varies significantly in terms of the degree of codification that different countries have reached. In countries lacking a codification of administrative procedures the trend can similarly be perceived in a more procedural rights based approach by the case-law<sup>116</sup>.

The convergent trend does not necessarily entail an homogeneity of the underlying values in the recognition of individual rights or the pace at which they are incorporated. This is best represented by the Scandinavian approach to the access of information, seen as a basic right of citizenship, while other countries like the United Kingdom is still shyly moving away from secrecy as the general rule, acknowledging in a limited fashion that throughout administrative procedures, the person concerned has a right to access relevant information<sup>117</sup>.

A short overview of the existing national legislations shall provide relevant insights of the current state of affairs and prospects of the EU legal order as concerns administrative procedures.

### *3.3.2.-The general codification of administrative procedures in Member States*

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<sup>115</sup> Mario Chitti, *Derecho Administrativo Europeo*, Civitas (Madrid, 2002), at 239.

<sup>116</sup> *Ibid.*

<sup>117</sup> Carol Harlow, "Global Administrative Law: The Quest for Principles and Values", 17(1) *European Journal of International Law* (2006), 187-214, at 193.

While in continental Europe the combination of the tradition of codification and the tradition of administrative law might lead to the belief that codification of administrative procedures was widespread among European countries, this assumption would prove false in a number of cases.

All the previously mentioned countries that were pioneer in trying to codify administrative procedures enjoy comprehensive administrative procedural laws at this point in time.

In Spain, codification of administrative procedures has a long tradition<sup>118</sup>. The law of 1992<sup>119</sup> is one of the most comprehensive statutes as it contains general rules for all administrative procedures but also on the legal regime of all aspects of administrative decisions and of public administration. However, it lacks the provisions for the exercise of rule-making powers<sup>120</sup>.

Similarly, in Austria the original law of 1925 was repealed by a new code of 1950 and last by the General Administrative Procedure Act or *Allgemeines Verwaltungsverfahrensgesetz* of 1991<sup>121</sup>. It is one of the most complete codifications of administrative procedures<sup>122</sup>, and it contains concepts of general scope and then details the procedural rules generally applicable. The Austrian codes were a model for Hungary, Poland, Czechoslovakia and other European countries<sup>123</sup>.

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<sup>118</sup> We referred above to the first framework law of 1889, which was replaced by the law of 1958, largely appraised by legal scholarship; see Gonzalez Navarro, “El Cincuentenario de la Ley...”, and later the Act of 1958 on the Administrative Procedure, influential in other countries, see Section 3.2.2.

<sup>119</sup> Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común; BOE 285 de 27 de noviembre de 1992.

<sup>120</sup> These are to be found at Law 50/1997, of 27 November, of the Government (BOE 28 November 1997).

<sup>121</sup> Allgemeines Verwaltungsverfahrensgesetz, BGBl. Nr. 51/1991 published in the Bundesgesetzblatt für die Republik Österreich of 31 January 1991, available at [http://www.ris.bka.gv.at/Dokumente/BgblPdf/1991\\_51\\_0/1991\\_51\\_0.pdf](http://www.ris.bka.gv.at/Dokumente/BgblPdf/1991_51_0/1991_51_0.pdf)

<sup>122</sup> Fromont, *Droit Administratif des ...*, at 212.

<sup>123</sup> Della Cananea, “Administrative Procedures and Rights...”, at 209.

Poland's original law of 1928 was repealed by a new code during the soviet era<sup>124</sup>. The Code of Administrative procedure of 1960<sup>125</sup> is still in force, although subject to profound revisions. Again, it is rather a code of general principles<sup>126</sup>, but contains the specific regulations of some of the most common administrative procedures, although most administrative procedures are regulated in special statutes, always in compliance with the general principles.

Hungary repealed its original Code of Administrative Procedure dating back from 1957 in 2004, when it approved the General Rules of the Administrative Proceedings and Services<sup>127</sup>. The newest Hungarian law contains a systematic regulation of the latest developments analysed, providing for safeguards for legality in all stages of the procedure. The control exercised in the areas of governance and supervision is primarily directed at the prevention of violation of the law, but it can also focus on the protection of the civic rights of those concerned<sup>128</sup>.

Italy's Law 241/1990 was similar to Spain's in as much as it is streamlined and basic, rather focused on principles than details<sup>129</sup>. According to Italian legal scholarship, this piece of legislation has deeply penetrated the fabric of society by radically changing the relationship between the administration and those 'administrated'<sup>130</sup>, while at the same time improving the administrative efficiency<sup>131</sup>. Similarly, the Luxembourgish Law on non-contentious administrative procedure of 1978<sup>132</sup>.

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<sup>124</sup> Korzeniowska, "Administrative Procedure...", at 130.

<sup>125</sup> Code of Administrative Procedure (*Kodeks postępowania administracyjnego*) of 14 June 1960, Journal of Laws 1960 No. 30, item 168.

<sup>126</sup> Among those principles, the peculiar structure of the procedure in two instances can be pointed out; see Korzeniowska, "Administrative Procedure..."

<sup>127</sup> Act No. CXL of 1 November 2004.

<sup>128</sup> Anita Paulovics, Guarantees of the Legality of Administration and Administrative Procedure in Hungary, 2 *DANUBE : Law and Economics Review* (2011), 43-53, at 44.

<sup>129</sup> Chitti, *Derecho Administrativo Europeo...*, at 239.

<sup>130</sup> Aldo Sandulli, "Editorial. The Italian Administrative Procedure Act: Back to the Future", 2(2) *Italian Journal of Public Law* (2010), 202-06, at 203.

<sup>131</sup> Della Cananea, "Administrative Procedures and Rights...", at 213.

<sup>132</sup> Loi réglant la procédure administrative non contentieuse of 1 December 1978, published in *Mémorial A* n° 87 of 27 December 1978, available at

A different approach to administrative procedure is the one taken by the German *Verwaltungsverfahrensgesetz* of 1976, which is much more detailed and does not confine itself to general principles<sup>133</sup>. However, it has been criticised by its lack of comprehensiveness, especially as rule-making procedures are excluded<sup>134</sup> and the federal structure of Germany precludes that its provisions are mandatory at the *Land* level<sup>135</sup>. In the German tradition, protection of fundamental rights is essential and thus procedure is largely seen as means for such protection<sup>136</sup>, thus enhancing the status of individuals *vis-à-vis* public authorities.

The Netherlands' General Administrative Law Act of 1994<sup>137</sup> was also aimed at more uniformity and systematization by means of subsidiary rules applicable as long as specific statutes specify no exceptions. Like the other laws of its generation, it has a individual rights approach<sup>138</sup>.

The newest law is that of Croatia of 2009<sup>139</sup>. Most other EU member States also have also participated in the codification of general principles of administrative

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<http://eli.legilux.public.lu/eli/etat/leg/l/1978/dec/01/n1>. Although a short framework law, puts the emphasis on the procedural rights of those affected by the administrative action

<sup>133</sup> Della Cananea, "Administrative Procedures and Rights...", at 212.

<sup>134</sup> Michael Fehling, "Comparative Administrative Law and Administrative Procedure", *Ius Publicum Annual Report* (2011), available at [http://www.ius-publicum.com/repository/uploads/14\\_02\\_2012\\_8\\_56\\_Fehling.pdf](http://www.ius-publicum.com/repository/uploads/14_02_2012_8_56_Fehling.pdf), at 7.

<sup>135</sup> Ortlieb Fliedner, "General Legislation on Administrative Procedures: What is the rationale? The case of Germany", SIGMA Paper available at <http://www.oecd.org/site/sigma/publicationsdocuments/35936457.pdf>

<sup>136</sup> Schmidt-Aßmann, "Structures and functions ...", 52, citing the judgement of the German Federal Constitutional Court *Bundesverfassungsgerichtsentscheidung* 24, 367 (401) of 29 April 1964.

<sup>137</sup> General Administrative Law Act of 4 June 1994, *Algemene wet bestuursrecht* available at [http://wetten.overheid.nl/BWBR0005537/geldigheidsdatum\\_25-04-2013](http://wetten.overheid.nl/BWBR0005537/geldigheidsdatum_25-04-2013)

<sup>138</sup> See Tom Barkhuysen, Willemien Ouden and Ymre Schuurmans, "The Law on Administrative Procedures in the Netherlands", Netherlands Administrative Law Library (2012), available at <http://www.nall.nl/tijdschrift/nall/2012/06/NALL-D-12-00004>

<sup>139</sup> General Administrative Procedures Act, of 27 March 2009, published in the Official Gazette no. 47 of 16 April 2009. It includes the latest developments in administrative procedures and makes a significant effort at the level of transparency and recognition of individual rights. See document Croatia. Administrative Legal Framework. Assessment May 2009, SIGMA papers, available at <http://www.oecd.org/site/sigma/publicationsdocuments/43912896.pdf>, at 7. The adoption of the new law due, in part, to the accession negotiations, see Commission Working Document. Croatia 2009 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, SEC(2009) 1333, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2009/hr\\_rapport\\_2009\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2009/hr_rapport_2009_en.pdf), at 7-8.



procedures<sup>140</sup>; being a general opinion that a codified or at least published procedural rules are beneficial for a properly working and fair public administration<sup>141</sup>.

In spite of codification, one could detect reminiscences of the old conception that the final decision only counts in some of the most important aforementioned acts. Examples of that statement are: the German *Verwaltungsverfahrensgesetz* provision that allows for the of the final decision to be kept in spite of a procedural breach if it is obvious that it had no influence on the final decision<sup>142</sup>; the Spanish *Ley de Régimen Jurídico de las Administraciones Públicas y de Procedimiento Administrativo Común* paragraph that excludes the annulment of a final decision for procedural breaches in certain cases<sup>143</sup>; and the Italian *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi* rule stating that measure adopted in breach of rules governing procedure or the form of instruments shall not be voidable if it is evident that the provisions it contains could not have been other than those actually adopted<sup>144</sup>.

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<sup>140</sup> Thus, Bulgaria (1969), Romania (1970), Sweden (1971), Denmark (1986), Portugal (1991), Slovenia (1999), Finland (2003).

<sup>141</sup> Jacques Ziller, “Administrations comparées Les systèmes politico-administratifs de l’Europe des Douze”, Montchrestien (Paris, 1993), 297.

<sup>142</sup> Article 46 of the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz* of 25 May 1976 available at <http://www.gesetze-im-internet.de/vwvfg/index.html> ) states “The repeal of an administrative act that is null and void in accordance with § 44 cannot be claimed only on the ground that it was adopted in violation of rules on the procedure, if it is obvious that it had no influence on the final decision.” See Furthermore, article 45(2) allows the administration to amend procedural mistakes even when there is a pending judicial procedure.

<sup>143</sup> Article 63(2) of the Spanish Common Procedural Act of 26 November 1992 (*Ley 30/1992, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*; BOE 285 of 27 November 1992) reads: “formal breaches shall only lead to the decision being annulled when it lacks the necessary requirements to achieve its purpose or when it results in a situation of defencelessness for the parties”.

<sup>144</sup> Article 21 *octies*(2) of Italy’s law of 7 august 1990 (n. 241 *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*. GU n.192, available at <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:1990-07-08;241>) reads:

“A measure that is adopted in breach of rules governing procedure or the form of instruments shall not be voidable if, by virtue of the fettered nature of the measure, it is evident that the provisions it contains could not have been other than those actually adopted. In any event, an administrative measure shall not be voidable on the grounds of failure to communicate the commencement of a procedure if the authority shows at trial that the content of the measure could not have been other than that actually adopted.” Paradoxically, this provision was introduced in the amendment of the Italian law in 2005; see further comment Della Cananea, “Administrative Procedures and Rights...”, at 213.

### 3.3.3.- *The lack of general codification of administrative procedures in Member States*

As an exception to the general progression of a codification in most EU member States, there are four countries that have decided not to enact general rules applicable to administrative procedure. This certainly although does not mean that such rules do not exist or that their legal regimen have followed a substantially different evolution to the one explained.

In France the rules on administrative procedures must be found in two sources<sup>145</sup>. On the one hand, the case law of the *Conseil d'État*, which not only has evolved, but whose seminal cases are milestones in the evolution of the procedural administrative law in Europe. On the other hand, several pieces of legislation adopted at different points of time. The most important of them are the law of 17 July 1978 on several measures for improving the relations between the administration and the public<sup>146</sup>; the law of 11 July 1979 on the motivation of administrative decisions<sup>147</sup>; and the law of 12 April 2000, on the rights of citizens in their relations with the administrative authorities<sup>148</sup>.

The historical reasons for the absence of any codification of administrative procedures in France are to be found in the spotlight traditionally set on the contentious procedures and the reliance on the prestige of the work of the *Conseil d'État*<sup>149</sup>. Although the current situation has long been criticised by prominent authors<sup>150</sup>, this does not preclude and new rights from being progressively introduced for individuals, and there is no prospect of change of approach.

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<sup>145</sup> Fromont, *Droit Administratif des États...*, at 214.

<sup>146</sup> Loi n° 78-753 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal (JORF du 18 juillet 1978 page 2851).

<sup>147</sup> Loi n° 79-587 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public (JORF du 12 juillet 1979 page 1711).

<sup>148</sup> Loi n° 2000-321 relative aux droits des citoyens dans leurs relations avec les administrations (JORF n°88 du 13 avril 2000 page 5646).

<sup>149</sup> Fromont, *Analyse comparé du droit...*, at 76.

<sup>150</sup> Guy Isaac, *La Procédure administrative non contentieuse*, Librairie générale de droit et de jurisprudence (Paris, 1968), at 181. Even when administrative procedures were still not codified in many European countries, Guy Isaac advocated for a codification in France to avoid many of the shortcomings of the dependence on the contentious procedure and the case-law of the *Conseil d'État*

The French vision has influenced many other countries, but singularly so Belgium<sup>151</sup>. Belgium relies on the principles laid down by its *Conseil d'État* and some scattered legislative acts and regulations pertaining to the regions and communities<sup>152</sup>, besides the right of access to documents, incorporated to the Belgian Constitution in 1993<sup>153</sup>.

Common law countries have traditionally resisted any codification. In England not only codification, but also administrative law appeared originally alien to its common law system, a feature which was best represented by Dicey's negation of any kind of *droit administratif* in England<sup>154</sup>. Even as late as in 1935, the Lord Chief Justice of England stated in a ruling the administrative law was 'continental jargon'<sup>155</sup>. However, this early conception has largely changed<sup>156</sup>. If the early academic thought, largely represented by Dicey, considered that denial of a special legal regime for public power was the best way to protect private interest, now this legal conception has changed and it is generally accepted that a special regime of public law is convenient to ensure, among others, recently recognised rights such as the right of privacy and access to documents<sup>157</sup>.

The original assumption is that in the United Kingdom the courts preserve individual rights, so any system that modifies or eliminates the judicial role raises the

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only. Paradoxically, whereas a systematic legislative approach has been adopted in most countries that lacked it, France remains an exception in this sense.

<sup>151</sup> Neville Brown and John Bell, *French administrative law*, Oxford University Press (Oxford, 1998), 269.

<sup>152</sup> Fromont, *Droit Administratif des États...*, 214.

<sup>153</sup> "Everyone has the right to consult every administrative document, and to obtain a copy thereof, except in the cases and conditions established by the law, a decree or in accordance with article 134."

<sup>154</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, Liberty Fund (Indianapolis 1982) (first published in 1897).

<sup>155</sup> Stanley A. Fuller and Rodney Brazier, *Constitutional and Administrative Law*, Penguin (London, 1973), at 525.

<sup>156</sup> Richard J. Pierce, Sidney A. Shapiro, and Paul Verkuil, *Administrative Law and Process*, Foundation Press (New York, 2008), 1-11.

<sup>157</sup> Peter Cane, *Administrative Law*, Oxford University Press (Oxford, 2011), at 8.

specter of excessive governmental control<sup>158</sup>. Thus, it is generally considered that administrative process must entail for the citizen the same guarantees than judicial process<sup>159</sup>. In addition, the courts themselves have developed a body of administrative law based on British principle of procedural fairness and reasonableness<sup>160</sup>, with the concept of abuse of powers playing the central role in the judicial review of the public administration's activity<sup>161</sup>.

The common law judges had recognised several procedural rights of citizens even before the first European codes of administrative procedures were enacted, by virtue of the principle of natural justice, which cover the protection of individual rights. At the same time, individual rights before courts provided for by the different statutes were immediately transposed into the status of citizens *vis-à-vis* the public administration.

Additionally, a series of *ad hoc* measures provide various unconnected elements of control and redress with the linked aim of providing for administrative justice. The Human Rights Act of 1998<sup>162</sup>, in particular, was capital in the introduction of new procedural rights<sup>163</sup>, thanks in part to the formal reception of the

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<sup>158</sup> Paul R. Verkuil, "Crosscurrents in Anglo-American Administrative Law", 27(4) *William and Mary Law Review* (1986), 685-713, at 687.

<sup>159</sup> Timothy Endicott, *Administrative Law*, Oxford University Press (Oxford, 2009), at 108.

<sup>160</sup> Richard Kirkham, "Oversight of Administrative Justice", Written evidence submitted to the UK Parliament on (OAJ 03) 2010-12 Session, available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpubadm/writev/oversight/oversi04.htm>

<sup>161</sup> Endicott, *Administrative Law*..., at 296, citing *R / Environment Secretary (ex parte Nottinghamshire County Council)* [1986] AC 240, 249: Lord Scarman stated:

"The ground upon which the courts will review the exercise of an administrative discretion by a public officer is abuse of power. Power can be abused in a number of ways; by a mistake of law in misconstruing the limits imposed by statute (or by common law) upon the scope of the power; by procedural irregularity; by unreasonableness in the Wednesday sense; or by bad faith or improper motive in its exercise."

<sup>162</sup> Human Rights Act of 9 November 1998 (c. 42) mostly came into force on 2 October 2000. It represents the repatriation of European Convention of Human Rights of 1950 to the UK. On the impact of the HRA on the British legislation and principles see David Feldman, "The Human Rights Act 1998 and constitutional principles", 19(2) *Legal Studies* (1999), 165-206.

<sup>163</sup> The impact of the act was so large that its entry into force had to be delayed until 2000 to train magistrates on the implications on the new act. Gary Slappen and David Kelly, *The English Legal System*, Routledge (Oxford, 2009), at 40.

case-law of the ECHR in Britain<sup>164</sup>. Other important pieces of legislation in this sense are the Freedom of Information Act of 2000<sup>165</sup> and the Equality Act of 2010<sup>166</sup>.

A similar system exists in Ireland, where the case-law has been supplemented by specific acts of Parliament like the Freedom of Information act of 1997<sup>167</sup>, giving general access to administrative documents.

As a matter of fact, the reasons for the lack of codification in the four abovementioned countries are opposite. The French system is still Administration-centred and hence still when it comes to providing legal protection against the administration ensuring that the administration adheres to law and statute prevails over the protection of the rights of the individual. In the common law tradition, the individual-centred conception of administrative justice has left in hands of the judges, not the legislator, the protection of citizens *vis-à-vis* public administration.

Apart from those four countries, only Romania, with scattered administrative procedural provisions, and Malta, which is in the process of enacting a law of administrative procedure, lack some kind of administrative procedural code at the moment.

The divergence is thus in the legislative technique rather than in the evolution of priorities. Diverse approaches have been adopted regarding codification, reflecting each country's own national legal and administrative culture<sup>168</sup>, yet the evolution towards a strengthening of administrative procedures and the improvement of individual procedural rights is present in all the cases. All European legal cultures could agree with the statement by professor Schwarze that the fact that the

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<sup>164</sup> Endicott, *Administrative Law...*, at 188. In particular, right such as the ones provided for in articles 6, 7, and 8 ECHR had a big impact in the status of individuals in administrative procedures.

<sup>165</sup> Freedom of Information Act of 30 November 2000 (c.36), fully coming into force on 1 January 2005.

<sup>166</sup> Equality Act of 8 April 2010, coming into force on 1 October 2010.

<sup>167</sup> Freedom of information Act, of 21 April 1997, number 13 of 1997, available at <http://www.irishstatutebook.ie/1997/en/act/pub/0013/print.html>

<sup>168</sup> Mario Chiti, "Towards a Unified Judicial Protection in Europe (?)", 9(3) *European Review of Public Law* (1997), 553-73, at 562, explains that "it is not by chance that some countries have never had a procedural code, and they do not seem to desire to have it".

administration is conceded a margin of discretion and of assessment seems nowadays justifiable only if discretion is exercised under strict observance of procedural guarantees<sup>169</sup>. This shall not lead to the conclusion that one approach or the other is completely innocuous. Codification does provide a simpler legal framework and, more importantly, legal certainty.

### ***3.4.- The conception of administrative procedures in the European Union***

#### *3.4.1.-Is there such a thing as an 'administrative procedure' of the European Union?*

The preceding outline of the conception and evolution of administrative procedures in European countries gives an idea that the concept is far from stable and homogeneous, even in a context limited to European countries. At the same time, the core of the notion can be discerned even when the judicial and scholarly focus might have rotated completely. It is a formal path, a sequence of formalities or, on a more ancient terminology, a rite that must be respected whenever an administrative decision shall be made, a rule enacted or an action taken. But the qualifying element of administrative procedures, as opposed to procedures in general terms, is that public administration is legally bound by these proceedings.

It would be erroneous to take for granted without further elaboration that those formal paths followed by the European Union Institutions and bodies in carrying out their administrative action are administrative procedures. The existence of administrative procedures at the EU level is a necessary premise for the development of the core concept of this thesis.

The existence of a European public administration was not consensually accepted by EU legal scholarship until very recently. Although there were solid arguments before for an 'EU administration', after the Treaty of Lisbon any legal ambiguity has dissipated. The main obstacle against the existence of administrative procedures at the EU level is thus overcome.

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<sup>169</sup> Jürgen Schwarze, "The Procedural Guarantees in the recent case-law of the Court of Justice", in Deirdre M. Curtin, Ton Heukels, and Henry G. Schermers (eds.) *Institutional dynamics of European integration. Volume II*, Nijhoff Publishers (Dordrecht, 1994), 487-97, at 495.

Paradoxically, unlike the European public administration, no serious doubts appear to have been raised related to the existence of administrative procedures, and they seem rather taken for granted. A basic legal justification for the existence of European administrative procedures is required before deepening the analysis and classification of them.

Administrative law scholars have long written on the administrative procedures at the European level without much questioning their existence<sup>170</sup>; and this is due to the fact that the European legislators and judges did not hesitate to use this nomenclature too. In the case of secondary law, the visibility of administrative procedures has been greater in areas of direct competence of the Communities<sup>171</sup>. Such was the case in the field of competition law, with the first antitrust regulation of 1962<sup>172</sup>; or agricultural policy instruments, with procedures to apply for agricultural

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<sup>170</sup> Administrative procedures in the European Union have long been an important part of general work on European administrative law. The first author to make a systematic analysis of European administrative procedure was Jürgen Schwarze, *Europäisches Verwaltungsrecht*, Nomos (Cologne, 1988), at 393. Later, many commentators have studied the issue, for instance, Santiago Muñoz Machado, “Los principios generales del procedimiento administrativo comunitario y la reforma de legislación básica española”, 75 *Revista Española de Derecho Administrativo* (1992), 329-58; Albrecht Weber, “El procedimiento administrativo en el derecho comunitario,” en Javier Barnes Vázquez (ed.), *El procedimiento administrativo en el derecho comparado*, Civitas (Madrid, 1993), 57-90; Eugenio Picozza, “Il regime giuridico del procedimento amministrativo”, 4(2) *Rivista Italiana di Diritto Pubblico Comunitario* (1994), 321-348; Xavier Arzo Santisteban, *Concepto y régimen jurídico del Acto Administrativo Comunitario*, Instituto Vasco de Administración Pública (Oñati, 1998), at 453; Nehl, *Principles of Administrative Procedure...*; Luciano Parejo Alfonso, “El Procedimiento Administrativo Comunitario”, in Luciano Parejo Alfonso, Tomás de la Quadra-Salcedo, Ángel Manuel Moreno Molina, and Antonio Estella de Noriega (eds.), *Manual de Derecho Administrativo Comunitario*, Editorial Centro de Estudios Ramón Areces (Madrid, 2000), 229-78; Sabino Cassese, “European Administrative Proceedings”, 68 *Law and Contemporary Problems* (2004), 21-36; Schwarze, “Judicial Review of European ...”; Francesca Bignami and Sabino Cassese, *Il procedimento amministrativo nel diritto europeo*, Giuffrè Editore (Milan, 2004); Giacinto della Cananea, “Procedimenti amministrativi dell’Unione Europea”, in Mario P. Chiti and Guido Greco, *Trattato di Diritto Amministrativo Europeo. Tomo I*, Giuffrè Editore (Milan, 2007), 497-536; Isaac Marín Delgado, “El procedimiento administrativo en el Derecho de la Unión Europea”, 19 *Revista de Derecho de la Unión Europea* (2010), 99-143; Carlos Moreira González (ed.), *Procedimientos Administrativos y Judiciales de la Unión Europea*, Editorial Difusión Jurídica (Madrid, 2012); Ballesteros Moffa, “Las dimensiones aplicativas el procedimiento administrativo ...”; José Eugenio Soriano García (ed.), *Procedimiento Administrativo Europeo*, Civitas (Madrid, 2012), and Guy Issac, *Droit communautaire général*, Masson (Paris, 1990), at 193.

<sup>171</sup> Picozza, “Il regimen giuridico del procedimento...”, at 324.

<sup>172</sup> EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ 1962 13, 204–211 English special edition: Series I Volume 1959-1962 P. 87 – 93).



funds in the 1960's<sup>173</sup>. But even before, the first decisions of the High Authority of the ECSC also contained provisions establishing elementary administrative procedures for the execution of the ECSC initial functions<sup>174</sup>. Those were the first European administrative procedures. The European legislator would start to use explicitly that denomination afterwards<sup>175</sup>, and the Commission used the terms with a more general scope in its internal rules of procedure<sup>176</sup>.

The Court of Justice has also used the expression administrative procedures in a plurality of cases regarding different proceedings carried out by the Commission, like competition law procedures<sup>177</sup>, customs<sup>178</sup>, and civil service regulations<sup>179</sup>, just to

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<sup>173</sup> Regulation No 130/66/EEC of the Council of 26 July 1966 on the financing of the common agricultural policy (OJ 1966 165, 2965–2970 English special edition: Series I Volume 1965-1966, 216 – 220; and Regulation No 741/67/EEC of the Council of 24 October 1967 on aid from the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ 1967 258, 2 – 4 English special edition: Series II Volume III, 25).

<sup>174</sup> For example, ECSC High Authority: Decision No 2-52 of 23 December 1952 determining the mode of assessment and collection of the levies provided for in Articles 49 and 50 of the Treaty (OJ 1952 1, 3 – 4 English special edition: Series I Chapter 1952-1958, 3); and ECSC High Authority: Decision No 26-54 of 6 May 1954 laying down in implementation of Article 66 (4) of the Treaty a regulation concerning information to be furnished (OJ 1954 9, 350 – 351 English special edition: Series I Chapter 1952-1958 P. 0017).

<sup>175</sup> For example, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1971 L 149, 2 – 50 English special edition: Series I Chapter 1971(II), 416), article 92; Council Regulation (EEC) No 1416/76 of 1 June 1976 on the financial provisions applying to the European Centre for the Development of Vocational Training (OJ 1976 L 164, 1 – 15), article 45; Council Regulation (EC) No 517/94 of 7 March 1994 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Community import rules (OJ 1994 L 67, 1 – 75), preamble; Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312), 1 – 4, articles 3 and 6; Commission Regulation (EC) No 2141/96 of 7 November 1996 concerning the examination of an application for the transfer of a marketing authorization for a medicinal product falling within the scope of Council Regulation (EC) No 2309/93 (OJ 1996 L 286, 6 – 8), preamble; Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, 43 – 48), preamble; and Council Regulation (EC) No 717/2008 of 17 July 2008 establishing a Community procedure for administering quantitative quotas (OJ 2008 L 198, 1–7), preamble.

<sup>176</sup> Rules of Procedure of the Commission [C(2000) 3614] (OJ 2000 L 308, 26 – 34).

<sup>177</sup> Case 52/69. *Geigy AG / Commission* [1972] ECR 787, paragraph 5; Joined Cases 46/87 and 227/88 *Hoechst / Commission* [1989] ECR 2859, paragraph 15; Case 27/88, *Solvay / Commission*, [1989] ECR 3355; more recently, Case T-99/04 *Treuhand / Commission* [2008] ECR II-1501, paragraph 50; Case T-410/09 *Almamet / Commission* [2012] not yet published, paragraph 26.

<sup>178</sup> Joined cases 98 and 99/75, *Carstens Keramik / Oberfinanzdirektion Frankfurt am Main*, [1976] ECR 241, paragraph 7; and Case 51/84 *Land Niedersachsen / Hauptzollamt Friedrichshafen* [1985] 2191, paragraph 14.



name a few fields. As a matter of fact, the case-law of the Court of Justice elaborated on certain general principles pertaining administrative procedures in cases in which there was a direct relationship between a European institution and a private party<sup>180</sup>. It is therefore only natural that not a lot of doubts were raised as to the suitability of the nomenclature. However, it might be meaningful to compare the proceedings followed at the EU level with the ones that take place in international organisations.

In the case of international organisations, the term administrative procedure has sometimes been used to relate to their decision-making processes<sup>181</sup>, although without a deep legal assessment and rather from a political science perspective. Legal scholarship on international institutional law has studied the proceedings used by international organisations only superficially<sup>182</sup>. International organisations seldom enjoy full-fledged normative powers. In the few cases in which they do, the legal character and effects of such normative material are debatable, but the most solid arguments are on the side of their consideration as soft law instruments<sup>183</sup>. Even the few hard international law regulations that can be found do not approach stereotypical conceptions of law based on advanced domestic legal systems<sup>184</sup>.

Accordingly, the rules which set the proceedings for international organisations to carry out their mandate often lack external relevance, and remain at a purely internal level<sup>185</sup>. They are referred to as ‘rules of procedure’, ‘standard

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<sup>179</sup> Case 91/76, *Joëlle de Lacroix / Court of Justice* [1977] ECR 225, paragraph 6; Case 29/80, *Reinartz / Commission* [1981] ECR 1311, paragraph 12; and Case 290/82 *Tréfois / Court of Justice* [1983] ECR 3751, paragraph 21.

<sup>180</sup> Susana Galera, *La aplicación administrativa del Derecho Comunitario. Administración Mixta*, Cívitas (Madrid, 1998), at 26.

<sup>181</sup> Bob Reinalda, and Bertjan Verbeek, *Autonomous Policy Making by International Organisations*, Routledge (London, 2005), at 45; and, David Zaring, "Informal Procedure, Hard and Soft, in International Administration", 5 *Chicago Journal of International Law* (2002), 547-96, at 550.

<sup>182</sup> Benedict Kingsbury and Lorenzo Casini, "Global Administrative Law Dimensions of International Organizations Law", 6 *International Organisations Law Review* (2009), 319-58, at 329-330. These commentators draw an interesting comparison with the little initial focus on domestic administrative procedures for the first half of the 20<sup>th</sup> Century.

<sup>183</sup> Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance", 54(3) *International Organization* (2000), 421-56, at 434. As an example, in the World Trade organisation

<sup>184</sup> *Ibid.*, at 454.

<sup>185</sup> Armin von Bogdandy, Philipp Dann and Matthias Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", 9(11) *German Law Journal* (2008), 1375-1400, at 1394.

instruments’, or ‘internal operational rules’<sup>186</sup>, but the normative power of those instruments is low. There seldom are any direct relationships between international organisations and individuals, and, when they occur, they are hardly proceduralised. Lacking external relevance and without a proper system of further judicial review, particularly for individuals, the qualification as administrative procedures for such rules is unsuitable.

This is a consequence of the fact that legal regimes of international organisation are for the most part relatively new and undeveloped<sup>187</sup>. Politics permeates international law and limits its autonomy<sup>188</sup>. The activities by international organisations can only in a lax understanding be called forms of administration<sup>189</sup>. This is nowadays an insurmountable obstacle for the qualification of the different proceedings in international organisations as administrative procedures from a strictly legal point of view.

In this sense, there is an essential distinctive element of the European Union as regards international organisations, which is the creation of a legal order. Unlike any international organisation, this new legal order is characterised by, on the one hand, its autonomy and supremacy *vis-à-vis* national legal orders and, on the other hand, its direct effect *vis-à-vis* individuals, entailing their right of judicial recourse directly before the EU judges. Thus, the existence of an autonomous, superior and directly enforceable legal order; and the legal recognition of a European public administration are the elements that set the European Union apart from international organisation for the purposes of our analysis.

As a result, in the European Union, administrative procedures are carried out by a public administration –that of the EU though often in cooperation with its national counterparts–, to implement the autonomous EU legal order, and allow for a

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<sup>186</sup> Matthias Goldmann, “Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority”, 9(11) *German Law Journal* (2008), 1865-1908, at 1895.

<sup>187</sup> Abbott and Snidal, “Hard and Soft Law...”, at 455.

<sup>188</sup> *Ibid.*

<sup>189</sup> Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* (2005), 15–62, at 17.

judicial review that, even with limitations, can be exercised directly by private parties. For this threefold reason, there are indubitably European Union administrative procedures.

#### *3.4.2.- The initial irrelevance of administrative procedures in the European Communities*

Even though European Community law was originally conceived as substantially a community of administrative law<sup>190</sup>, and administrative procedures are a key element of the discipline, the topic of administrative procedures received very little attention, both by the Treaties and by legal scholarship<sup>191</sup>. Professor Chiti sees two sets of reasons for this feature<sup>192</sup>.

The first explanation lies in the influence of the legal conceptions of the original Member States. As we examined in detail before<sup>193</sup>, the key element in the relationship administration-citizen was, around the mid-20<sup>th</sup> Century, the administrative act –only element which could be reviewed– while whatever came before had at best a merely indirect relevance. This was particularly the vision in France –the country whose administrative law had by far the greatest influence in the legal configuration of the Communities<sup>194</sup>– until the case-law of the *Conseil d'État* began to shift but, by then, the legal foundations of the early Communities had already been established in accordance with the vision of the central role of the administrative act.

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<sup>190</sup> See the old work by Hans Ipsen, *Europäische Gemeinschaftsrecht*, J. C. B. Mohr (Tübingen, 1972), and 11; and, in a more detailed manner, Schwarze, *Europäisches Verwaltungsrecht...*, at 8.

<sup>191</sup> Della Cananea, “Procedimenti amministrativi ...”, at 500; and Chiti, *Derecho Administrativo Europeo...*, 237.

<sup>192</sup> *Ibid.*

<sup>193</sup> See section 3.2.1.

<sup>194</sup> Brown and Bell, *French administrative law...*, 279. These authors argue furthermore that all founding members of the Communities had also received a powerful influence of French administrative law during the Napoleonic era.

The heritage of the traditional conception of member States is manifest in article 173 of the Treaty of the European Economic Community<sup>195</sup>, which refers exclusively to Community acts and to the grounds of invalidity thereof. This provision has remained substantially unchanged until today<sup>196</sup>.

The second set of reasons is to be found in some of the specific traits of the original legal order of the European Communities. Three characteristics are enlightening<sup>197</sup>:

- firstly, the configuration of the EC legal order as a system with limited objectives under the principle of conferral<sup>198</sup>, which entailed a very restricted level of competences and thus a limited administration to carry out any functions. Although this principle is still in force, the competences of the Union have grown exponentially covering virtually all aspects of administrative activity to a larger or smaller extent;

- secondly, the indistinctness between normative acts and single case decisions (or administrative acts), resulting in a lack of systematic treatment of the sources of EU law and the mechanisms to enact rules and to adopt decisions; and,

- lastly, the minimalist conception of a European public administration, needing the support of national administrations and very rarely conducting the direct administration of their policies. This leads to the stoplight being put on the national procedures of indirect administration, rather than on the EU level.

#### *3.4.3.-The evolution and consolidation of administrative procedures at the EU level.*

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<sup>195</sup> “The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission. For this purpose, it shall be competent to give judgment on appeals by a Member State, the Council or the Commission on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power.”

<sup>196</sup> The wording of today’s article 263 TFEU is virtually unchanged in its first paragraph. Amendments have only modified this provision when it comes to the legal standing of the parties to challenge EU acts.

<sup>197</sup> Chiti, *Derecho Administrativo Europeo...*, at 238.

<sup>198</sup> Articles 4 and 5 TEU.

The same factors explaining the initial irrelevance of administrative procedures provide the hints for its subsequent evolution. National legislations shifted towards a more central role of administrative procedures in decision and rule making, a more formal approach<sup>199</sup> that was welcomed by administrative legal scholarship.

The EU specific factors also changed dramatically. To begin with, the expansion of EU competences in each and every amendment of the Treaties is perhaps one of the clearest indicators of the success of European integration<sup>200</sup>. Today few aspects of Member States policies remain exempt from EU influence. The result of this expansion is understandably the growth of EU administrative action<sup>201</sup>.

As for the second aspect, the difference between normative and administrative acts was advanced by the ill-fated Constitutional Treaty<sup>202</sup>, meeting the old demands of legal scholarship for the clarification of sources of EU secondary law<sup>203</sup>. Although the Treaty of Lisbon leaves aside the clearer nomenclature of the Constitutional Treaty; that is, the formal distinction between legislative and non-legislative acts, based essentially on the procedure for adoption<sup>204</sup>, it maintains the structural classification of secondary law provisions<sup>205</sup>, and introduces the term regulatory acts as distinct from single case decisions.

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<sup>199</sup> Jaques Ziller, "The Convergence of National Administrative Procedures: Comments on the European perspective", 2(1) *Italian Journal of Public law* (2010), 290-95, at 290.

<sup>200</sup> Wolfgang Wessels, "An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes", 35(6) *Journal of Common Market Studies* (1997), 267-99.

<sup>201</sup> Chiti, *Derecho Administrativo Europeo...*, at 240.

<sup>202</sup> Article I-33(1) CT:

"To exercise the Union's competences the institutions shall use as legal instruments, in accordance with Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions."

Articles I-34 and I-35 distinguish and define legislative and non-legislative acts, therefore providing for a clear hierarchy of legal instruments. See further Jaques Ziller, *Il nuovo Trattato europeo*, Collana (Bologna, 2007), at 163.

<sup>203</sup> Eva Nieto-Garrido and Isaac Martín Delgado, *European Administrative Law in the Constitutional Treaty*, Hart Publishing (Oxford, 2007), at 9.

<sup>204</sup> Carmen Martínez Capdevilla, "A vueltas con la noción de "acto legislativo" y sus consecuencias jurídicas en el Derecho de la Unión Europea", in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2013* Aranzadi (Cizur Menor, 2014), 97-159, at 105.

<sup>205</sup> See, for more details, Francisco Balaguer Callejón, "La incidencia del Tratado de Lisboa en el sistema de fuentes comunitario y su influencia en los ordenamientos estatales", in Francisco Javier Matia Portilla (ed.), *Estudios sobre el Tratado de Lisboa*, Comares (Granada, 2009), 65-94; and Lucía

This is due in part to the term ‘regulatory acts’, which was not taken away in the Treaty of Lisbon<sup>206</sup>. On the occasion of the first interpretation of the provision referring to ‘regulatory acts’, *i. e.* article 263(4) TFEU<sup>207</sup>, which enlarged the citizens’ right to access to the European courts, the General Court elaborated with detail on the typology of EU acts. Thus, in the cases *Inuit*<sup>208</sup> and *Microban*<sup>209</sup>, the GT clarified taxonomy of administrative law sources, which was later confirmed by the Court of Justice<sup>210</sup>. For the purposes of access to European justice, it was logical to open the procedural standing of citizens in non-legislative acts of general application, while

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Millan Moro, “El ordenamiento jurídico comunitario: del Tratado Constitucional al Tratado de Lisboa”, 36 *Revista de Derecho Comunitario Europeo*, (2010), 401-38.

<sup>206</sup> Jürgen Schwarze, “European Administrative Law in the Light of the Treaty of Lisbon”, 18(2) *European Public Law* (2012), 285-304, at 297.

<sup>207</sup> “Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

<sup>208</sup> Case T-18/10, *Inuit Tapiriit Kanatami / Commission* [2011] ECR II-5599. The General Court argued that (paragraphs 44-46 and 49-50):

“The first paragraph of Article 263 TFEU sets out a number of categories of acts of the European Union which may be subject to a review of legality, namely, first, legislative acts and, secondly, other binding acts intended to produce legal effects vis-à-vis third parties, which may be individual acts or acts of general application.

It must be concluded that the fourth paragraph of Article 263 TFEU, read in conjunction with its first paragraph, permits a natural or legal person to institute proceedings against an act addressed to that person and also (i) against a legislative or regulatory act of general application which is of direct and individual concern to them and (ii) against certain acts of general application, namely regulatory acts which are of direct concern to them and do not entail implementing measures.

Furthermore, such an interpretation of the word ‘regulatory’, and of the equivalent word in the different language versions of the FEU Treaty, as opposed to the word ‘legislative’, is also apparent from a number of other provisions of the FEU Treaty, in particular Article 114 TFEU, concerning the approximation of the ‘provisions laid down by law, regulation or administrative action in Member States’.[...]

In the second place, the interpretation of the fourth paragraph of Article 263 TFEU upheld in paragraphs 42 to 45 above is borne out by the history of the process which led to the adoption of that provision [...] [T]hat wording enabled ‘a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts (for which the “of direct and individual concern” condition remains applicable)’.[...]

In the third place, [...] the conditions of admissibility of an action for annulment of a legislative act are still more restrictive than in the case of proceedings instituted against a regulatory act.”

<sup>209</sup> Case T-262/10, *Microban / Comisión* [2011] ECR II-7697.

<sup>210</sup> Case C-583/11 P *Inuit Tapiriit Kanatami and Others / Parliament and Council* [2013] not reported (ECLI:EU:C:2013:625), at paragraph 93, Case C-132/12 P *Stichting Woonpunt e.a. / Commission* [2014] not reported (ECLI:EU:C:2014:100); Case C-248/12 P *Northern Ireland Department of Agriculture and Rural Development / Commission* [2014] not reported (ECLI:EU:C:2014:137); Case C-274/12 P *Telefónica SA / Commission* [2014] not reported (ECLI:EU:C:2013:852), at paragraph 29.

keeping a stricter stance with regard to legislative acts<sup>211</sup>. When it comes to the purposes of this work, the innovation at the level of primary law together with this recent case-law have paved the way for a more mature conceptualization of administrative procedures in the European Union.

Finally, the enlargement of European public administration and its capabilities, as well as the ongoing substitution of indirect administration by composite procedures, which is the core element of this dissertation.

The very evolution in Member States from a substantive approach towards a rather procedural approach on the assessment of administrative decisions, as developed in the previous section, has had a clear impact in the conception of administrative procedures at the EU level. In this vein, it is important to highlight the diverse influences that the different national legislation.

Thus, French administrative law, with its original focus on the '*acte administratif*', had the most capital influence in the formulation of the key concepts of European administrative law<sup>212</sup>. The accession of Britain in the 70's was essential in the development of procedural guarantees inherent to the common law concept of *due process of law*<sup>213</sup>, as was the German *Bundesverfassungsgericht's*<sup>214</sup> contribution with the principle of proportionality. Lastly, the accession of Scandinavian countries in the

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<sup>211</sup> Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law. Text and Materials*, Cambridge University Press (Cambridge, 2010), at 415.

<sup>212</sup> Jürgen Schwarze, "El Derecho administrativo europeo a la luz del Tratado de Lisboa", in Mercedes Fuertes (ed.), *Un Procedimiento Administrativo para Europa*, Aranzadi (Pamplona, 2012), 25-52, at 30.

<sup>213</sup> *Ibid.* According to professor Schwarze the British view were reflected as early as the ruling in Case 17/74 *Transocean Maritime Paint Association / Commission* [1974] ECR 1063.

<sup>214</sup> This principle was already well embedded in the German administrative law tradition as it had been used by German administrative courts during the 19<sup>th</sup> Century to limit the powers of the police; see Moshe Cohen-Eliya and Iddo Porat, "American Balancing and German Proportionality: The Historical Origins" 8 *International Journal of Constitutional Law* (2010), 263-86, at 272. However, the German Constitutional Court, in particular since its ruling BVerfGE 3, 383, 399 (1954), took it from the administrative law field and enshrined it as a general principle of the *Rechtsstaat*; see Susanne Baer, "Equality: The Jurisprudence of the German Constitutional Court" 5 *Columbia Journal of European Law* (1999) 249-280, at 261.



90's was crucial in the enlargement of the scope of the principle of transparency and the recognition of the right of access to documents<sup>215</sup>.

This juxtaposition of different legal traditions results in difficulties in using concepts that are essential in some administrative law traditions and go completely disregarded in some other, as it is the notable case of an "European administrative act". Professor Arzoz Santisteban<sup>216</sup>, points out that while this notion is generally used as a globalising concept covering the different measures taken as part of the EU administrative action (especially for German and Italian scholars), the term 'administrative act' does not appear in European administrative law manuals of Anglo-Saxon origin<sup>217</sup>.

Besides these elements, there is a fundamental actor whose contribution can hardly be overstated. The Court of Justice set forth the general principles shaping administrative procedures in the Union<sup>218</sup>. Thus, in the absence of codification and, what is more, due to the scarcity of general provisions concerning administrative procedures, it is general principles that make up the backbone of the notion of legal procedures at EU level<sup>219</sup>. The consequences of the case-law of the Court of Justice are not only related to the development of general principles of EU procedural law, but also have been felt at the level of national legislation<sup>220</sup>.

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<sup>215</sup> Maarten Hillebrandt, Deirdre Curtin and Albert Meijer, "Transparency in the Council of Ministers of the EU. An Institutional Approach", Amsterdam *Centre for European Law and Governance Working Paper Series 2012 – 04*, at 11, available at <http://acelg.uva.nl/publications>, citing Carsten Grønbech-Jensen, "The Scandinavian tradition of open government and the European Union: problems of compatibility?", 5(1) *Journal of European Public Policy* (1998), 185-199.

<sup>216</sup> Xabier Arzoz Santisteban, "Acto y Procedimiento Administrativo: un Catálogo de Problemas", in José Eugenio Soriano García (dir.), *El Procedimiento Administrativo Europeo*, Civitas (Madrid, 2023), 195-250, at 206.

<sup>217</sup> The case of two works often cited in this thesis; Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2012) and Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, *Administrative Law and Policy of the European Union*, Oxford University Press (Oxford, 2011), are particularly noteworthy.

<sup>218</sup> Chiti, *Derecho Administrativo Europeo...*, at 240.

<sup>219</sup> See in much more detail Jürgen Schwarze, "Developing Principles of European Administrative Law" *Public Law* (1993) 229-39. However, we will only comment briefly on the EU general principles that are directly relevant in the field of administrative procedures.

<sup>220</sup> Mariolina Eliantonio, The Future of National Procedural Law in Europe: Harmonisation vs Judge-made Standards in the Field of Administrative Justice, 13(3) *Electronic Journal Of Comparative Law*, (2009), available at <http://www.ejcl.org/133/art133-4.pdf>



It is precisely in view of the most recent case law of the Court of Justice that judge Lenaerts argues that there is a shift towards a strict process review that leaves aside the former emphasis exclusively on substantive outcomes<sup>221</sup>, which has been captured by recent rulings of the Court of Justice. This trend has a capital impact in the analysis carried out in this work.

#### *3.4.4.-The case law of the Court of Justice and the development of general principles of European administrative procedural law*

The principles of European administrative law constitute the backbone of the discipline. These principles have been developed and elaborated by the Court of Justice. The following of those principles have a particular impact on the conclusions that we will reach.

The first principle, basic in even the earliest versions of modern public administrations in all member States, is the principle of legality. As developed further by the Court of Justice in several other general principles, it is a central element of European administrative law<sup>222</sup>.

Considering that article 264<sup>223</sup> TFEU entitles the Court of Justice to review the legality of all EU acts, *i. e.* their validity according to the EU legal order founded on the Treaties, the Court of Justice stated in *Hörsch AG*<sup>224</sup> that:

*“in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether*

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<sup>221</sup> Lenaerts, “The European Court of Justice and...”, at 3. He cites in particular, C-58/08 *Vodafone / Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999; Joined Cases C-92 and 93/09 *Volker and Markus Schecke GbR / Land Hesse* [2010] ECR I-11063; and Case C-236/09 *Association belge des Consommateurs Test-Achats / Council* [2011] ECR I-773.

<sup>222</sup> See in detail Alberto Massera, “I Principi Generali”, in Mario Chiti and Guido Greco (eds.), *Trattato di Diritto Amministrativo Europeo. Parte Generale. Tomo I.*, Guiffirè Editore (Milan, 2007), 285-414, at 317.

<sup>223</sup> Former article 230 TEC; “The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.”

<sup>224</sup> CJEC, Joined cases 46/87 and 227/88, *Hörsch / Commission*, judgement of 21 September 1989 [1989] ECR 2859, paragraph 19.

*natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention . The need for such protection must be recognized as a general principle of Community law.”*

This statement must be framed in the more pompous declaration that *Les Verts* that the EU is a community based on the rule of law<sup>225</sup>. Hence the idea that any activity of the public administration shall be bound by and apply the law constitutes a primeval principle from which all others derive.

Two principles are linked to the principle of legality; the principle of legal certainty and the principle of legitimate expectations. The principle of legal certainty dates back to the earliest case-law of the Court of Justice. In *SNUPAT*<sup>226</sup> in the early 1960's, the Court of Justice, ruling on the possibility of revoking unlawful exemptions, balanced the principles of legality and legal certainty<sup>227</sup> and decided, considering that the general prohibition of retroactivity can be excluded if the interested party has provided the authorities with false information, to give prevalence to the former.

The essence of this principle lies on the premise that the law must be certain, in that it is clear, precise, and understandable, and its legal implications are

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<sup>225</sup> CJEC, Case 294/83, *Les Verts / Parliament*, judgement of 23 April 1986, [1986] *ECR* 1339, paragraph 23. The rule of law principle has later become one of the founding value of the Union enshrined in article 2 TEU.

<sup>226</sup> Joined cases 42 and 49/59, *SNUPAT / High Authority* [1961] *ECR* English special edition 53.

<sup>227</sup> The Court of Justice reasoned that:

“That allegation disregards the fact that the principle of respect for legal certainty, important as it may be, cannot be applied in an absolute manner, but that its application must be combined with that of the principle of legality; the question which of these principles should prevail in each particular case depends upon a comparison of the public interest with the private interests in question, that is to say:

On the one hand, the interest of the beneficiaries and especially the fact that they might assume in good faith that they did not have to pay contributions on the ferrous scrap in question, and might arrange their affairs in reliance on the continuance of this position.

On the other hand, the interest of the Community in ensuring the proper working of the equalization scheme, which depends on the joint liability of all undertakings consuming ferrous scrap; this interest makes it necessary to ensure that other contributors do not permanently suffer the financial consequences of an exemption illegally granted to their competitors.”

foreseeable<sup>228</sup>. Hence, it is a guarantee for individuals who, in the words of the European judges in the recent ruling in *Heinrich*<sup>229</sup>, must be able to ascertain unequivocally what their rights and obligations are and act accordingly<sup>230</sup>.

Excluding the scope of the principle concerning penal measures<sup>231</sup>, it entails a twofold restriction. On the one hand, a temporal limit, as it entails a general prohibition of retroactivity. This means that a measure cannot take effect before its publication<sup>232</sup>, although it is possible to regulate future effects of situations started before its entry into force<sup>233</sup>. On the other hand, it brings about a requirement of clarity. EU legislation must be understandable by its addressees and its consequences foreseeable<sup>234</sup>. Obscurity of legal provisions, however, has never been, so far, the only cause for the Court of Justice to annul an act<sup>235</sup>.

The principle of legitimate expectations is an essential principle of the relations between the individuals and public administrations, limiting the possibilities of the later to modify courses of action in prejudice to the individual acting in good faith<sup>236</sup>. The principle of legitimate expectations implies a difficult balance between the lawful power of institutions to change their previous behaviour and the legitimate expectations of citizens who are subject to those changes<sup>237</sup>.

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<sup>228</sup> Kaczorowska, *European Union Law...*, at 232.

<sup>229</sup> Case C-345/06, *Heinrich* [2009] ECR I-1659. This case is of particular interest from the point of view of legal certainty, as it concerns the validity of unpublished regulations. The Court states that a secret Community regulation is valid law. It just cannot impose obligations on individuals. Considering that this judgement delivered by Grand Chamber is not respectful enough of the principle of legal certainty Michal Bobek, "Case C-345/06, Gottfried Heinrich, Judgment of the Court of Justice (Grand Chamber) of 10 March 2009", 46 *Common Market Law Review* (2009), 2077-94.

<sup>230</sup> *Ibid.*, at paragraph 44.

<sup>231</sup> Chalmers, Davis and Monti, *European Union Law ...*, at 411.

<sup>232</sup> Case 84/78, *Tomadini / Amministrazione delle Finanze dello Stato* [1979] ECR 1801, at paragraph 20.

<sup>233</sup> Case 63/83 *R / Kent Kirk* [1984] ECR 2689, at paragraph 22.

<sup>234</sup> Case 325/85 *Ireland / Commission* [1987] ECR 5041, and C-301/97 *Netherlands / Council* [2001] ECR I-8853.

<sup>235</sup> Chalmers, Davis and Monti, *European Union Law ...*, at 411.

<sup>236</sup> Søren Schønberg *Legitimate Expectations in Administrative Law*, Oxford University Press (Oxford, 2000), at 12.

<sup>237</sup> *Ibid.*

The case law of the Court of Justice is mostly related to areas of strict regulatory control, like agriculture<sup>238</sup>. It has shown a certain tendency to award the institutions a wide margin of manoeuvre in market management, even where the chosen scheme has been subjected to criticism<sup>239</sup>. On the contrary, there seems to be a stricter stance on the recipient of the measure. In *Van den Bergh and Lopik / Commission*<sup>240</sup>, for example, it stated that the principle cannot be invoked if a "prudent and discriminating trader" could reasonably have foreseen a change of schemes, particularly in agricultural policy where constant changes are needed to adapt to economic circumstances<sup>241</sup>.

The case *Spain / Council*<sup>242</sup> is very illustrative of the conceptual approach of legitimate expectations in term of time limits and reasonableness. In this case, Spain contested the amendment of the new cotton support scheme introduced by the Council<sup>243</sup>. According to it, the aids are not linked to the cotton actually harvested but rather to the maintenance of cultivation<sup>244</sup>. Spain argued that it infringed the legitimate expectations of operators in the cotton sector, as their crops were managed so as to comply with the previous scheme, and the change implies direct economic losses for them<sup>245</sup>. The Court stated that the principles cannot be pleaded if a prudent and circumspect operator could have foreseen that the adoption of a Community

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<sup>238</sup> Eleanor Sharpston, "European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom", 11(1) *Northwestern Journal of International Law & Business*, (1990) 87-103, at 90.

<sup>239</sup> *Ibid.*

<sup>240</sup> Case 265/85, *Van den Bergh and Lopik / Commission* [1987] ECR 1155, at 44: "any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectations. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted."

<sup>241</sup> Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraph 70; Case C-104/97 P *Atlanta / European Community* [1999] ECR I-6983, paragraph 52; and Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 25.

<sup>242</sup> Case 310/04, *Spain / Council* [2006] 2006 ECR I-7285.

<sup>243</sup> Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, 1-69).

<sup>244</sup> Articles 110a to 110c of Regulation No 1782/2003 as amended.

<sup>245</sup> Case 310/04, at paragraph 79

measure was likely to affect his interests, as they are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained<sup>246</sup>. Hence, this principle, as it has been conceived by the Court of Justice, has a limited operability.

A more EU specific principle is the principle of non-discrimination or, in a broader sense, the principle of equality. It was originally aimed at abolishing all kinds of discriminations regarding nationality, but soon expanded<sup>247</sup> to other aspects and grounds of discrimination<sup>248</sup>. Declared a general principle by the Court of Justice in *Ruckdeschel*<sup>249</sup>, this principle implies that analogous situations cannot be treated differently<sup>250</sup> unless the treatment is objectively justified<sup>251</sup>. From the perspective of law execution, this principle is binding to all authorities in charge of such implementation, including national authorities<sup>252</sup>. After the declaration of the basic principle that everyone is equal before the law is a basic principle by the Court of Justice<sup>253</sup>, it has been enshrined in primary law<sup>254</sup>.

The principle of good administration is arguably the one with the most direct impact on administrative procedures at the EU level<sup>255</sup>. The Court of Justice –to be precise, the Court of First Instance more frequently–had consistently held that individuals do have a number of procedural rights ensuring that they are treated fairly

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<sup>246</sup> *Ibid.*, at paragraph 81.

<sup>247</sup> Sex discrimination was tackled in the famous Case C-149/77 *Defrenne / Sabena* [1978] ECR I-1365 at paragraph 26. In other aspects, such as sexual orientation, the Court has taken a more cautious approach, *see*, for example, Case C-249/96 *Grant / South West Trains Ltd* [1998] ECR I-621.

<sup>248</sup> Takis Tridimas, *The General Principles of EU Law*, Oxford University Press (Oxford, 2006), at 106.

<sup>249</sup> Case 117/76, *Ruckdeschel / Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, at paragraph 7: “The prohibition of discrimination laid down in [article 40(3) TEEC] is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law.”

<sup>250</sup> Case 106/83, *Sermide SpA / Cassa Conguaglio Zuccheri* [1984] ECR 4209, at paragraph 28.

<sup>251</sup> Case C-189/01, *Jippes and others* [2001] ECR I-5689, at paragraph 129; and Case C-149/96 *Portugal / Council* [1999] ECR I-8395, at paragraph 91.

<sup>252</sup> Case C-442/00 *Caballero / FOGASA* [2002] ECR I-11915, at paragraph 32.

<sup>253</sup> As an example, Case 283/83 *Racke* [1984] ECR 3791.

<sup>254</sup> Article 2 TEU.

<sup>255</sup> Koen Lenaerts, “‘In the Union we trust’: Trust-enhancing principles of Community law”, 41(2) *Common Market Law Review* (2004), 317-43, at 336.

by the Commission<sup>256</sup>; but it was in *max.mobil / Commission* when it explicitly recognised it as a general principle stemming from the constitutional traditions of Member States<sup>257</sup>.

In reality, when the explicit reference to ‘good administration’ was adopted by the Court of Justice, it had already been written in the Charter of Fundamental Rights<sup>258</sup>, even if it did not have a binding legal value back then<sup>259</sup>. The principle of good administration is indeed an umbrella-principle, for some authors the specification of the principle of legality<sup>260</sup>, under which many other more specific procedural principles are safeguarded. Those had been declared and elaborated by the Court of Justice before the proclamation of the Charter in 2000.

The procedural rights to of defence were recognised even if not explicit in the relevant provisions of secondary law. Thus, the Court of Justice considered that respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of specific rules<sup>261</sup>.

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<sup>256</sup> Joined Cases 142/84 and 156/84 *BAT and Reynolds / Commission* [1987] ECR 4487, at paragraph 20; CFI, Case T-24/90 *Automec / Commission* [1992] ECR II-2223, paragraph 79; Case C-269/90 *Technische Universität München / Hauptzollamt München* [1991] ECR I-5469, at paragraph 22; and Case T-95/96 *Gestevisión Telecinco / Commission* [1998] ECR II-3407, at paragraph 53.

<sup>257</sup> Case T-54/99, *max.mobil / Commission*, [2002] ECR II-313, at paragraph 48: “it must be emphasised at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States.”

On appeal, the Court of Justice quashed the ruling of the CFI on grounds of admissibility, Case C-141/02 P *Commission / T-Mobile Austria* [2005] ECR I-1283. This principle was later enuciated in subsequent rulings such as Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen / Commission* [2003] ECR II-435, at paragraph 121; and Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV 2/Danmark A/S / Commission* [2008] ECR II-02935, at paragraph 183. See also Miguel Antonio Guevara Quintanilla, *El derecho a la buena administración*, Publicaciones de la Universidad Complutense (Madrid, 2010), at 135.

<sup>258</sup> Article 41.

<sup>259</sup> Proclaimed at Nice on December 7, 2000, (OJ 2000, C 364, 1).

<sup>260</sup> Chiti, *Derecho Administrativo Europeo...*, at 250.

<sup>261</sup> Case 234/84 *Belgium / Commission* [1986] ECR 2263, at paragraph 27; Case C-301/87 *France / Commission* (‘*Boussac*’) [1990] ECR I-307, at paragraph 29; Case C-142/87 *Belgium / Commission* [1990] ECR I-959, at paragraph 46; and Case C-288/96 *Germany / Commission* [2000] ECR I-8237, at paragraph 99

Among those rights of defence, under the legal concept of *due process of law*<sup>262</sup>, the case law of the Court of Justice has singled out the right to a fair hearing, the right to an impartial examination of all elements of one's case (*duty of care*), and the right to a reasoned decision. In the case *Technische Universität München / Hauptzollamt München-Mitte* is stated<sup>263</sup>:

“...where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.”

The right to be heard occupies a major position, with a very early recognition by the Court of Justice<sup>264</sup>. According to the Court of Justice, the traditional principle *audi alteram partem* requires that the person against whom an administrative procedure has been initiated must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been infringement of EU law. Thus, the Court of Justice has repeatedly held that the right to a fair hearing is a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question<sup>265</sup>.

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<sup>262</sup> Chiti, *Derecho Administrativo Europeo*..., at 249.

<sup>263</sup> C-269/90, *Technische Universität München / Hauptzollamt München-Mitte* [1991] ECR I-5469, at paragraph 14.

<sup>264</sup> CJEC, C-32/62, *Alvis / Council* [1963] ECR 49 (English special edition).

<sup>265</sup> First declared as a general principle in Case 85/76, *Hoffmann-La Roche / Commission* [1979] ECR 461, at paragraph 9; and subsequently in Case 234/84 *Belgium / Commission* [1986] ECR 2263, at paragraph 27; Case 301/87 *France / Commission* (“*Boussac Saint Frères*”) [1990] ECR I-307, at paragraph 29; Case C-32/95 P *Commission / Lisrestal and Others* [1996] ECR I-5373, at paragraph 21; Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique / Commission* [1998] ECR I-1375, at paragraph 174; Case C-238/99 P, *Limburgse Vinyl*



When it comes to the duty of care, also referred to as the principle of care or due diligence, can be described as a procedural tool for individuals to ensure that the Union's Institutions handle their affaires with care in a twofold way, how the matter is handled and how different elements are assessed and balanced<sup>266</sup>. Thus, this principle imposes the obligation to observe duties and practices that do not lead to mistakes adversely affecting private parties<sup>267</sup>, but also to take into account the relevant input of third parties with no formal status in the administrative procedure in question<sup>268</sup>. The implications in practical terms of this principle are<sup>269</sup>, for instance, in the field of customs, that the Commission shall monitor trade between the EU and third countries<sup>270</sup>; or, in the field of medicines, that the OHIM shall respect certain deadlines and procedural practices that guarantee the effectiveness of the proceedings<sup>271</sup>.

Last but not least, the right to a reasoned decision was an essential right in the earliest European procedural law<sup>272</sup>, as a consequence of its early incorporation to the Treaties<sup>273</sup>. As promptly as the *Nold*<sup>274</sup> ruling in the late 50's, the Court of Justice

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*Maatschappij / Commission* [2002] ECR I-8375, at paragraph 85; and Case C-382/99, *Netherlands / Commission* [2002] ECR I-5163, at paragraph 49.

<sup>266</sup> Jane Reichel, "Between Supremacy and Autonomy – Applying the Principle of Good Administration in the Member States", in Ulf Bernitz, Joakim Nergelius, and Cecilia Cardner (eds.), *General Principles of EC Law in a Process of Development*, Kluwer Law International (Alphen aan der Rijn, 2008), 243-71, at 247.

<sup>267</sup> *Ibid.*, at 148.

<sup>268</sup> Case C-367/95 P, *Commission / Sytraval and Brink's France* [1998] ECR I-1719, paragraph 62, and Case C-170/02 P *Schlüsselerlag J.S. Moser and Others v Commission* [2003] ECR I-9889, paragraph 29. The compilation of those judgements is put forward by AG Poiares Maduro in the Opinion of Case C-141/02 P *max.mobil / Commission* [2005] ECR I-1283, at paragraph 81.

<sup>269</sup> Reichel, "Between Supremacy and Autonomy...", at 148.

<sup>270</sup> Case T-42/96 *Eyckeler & Malt / Commission* [1998] ECR II-401, at paragraph 165; Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring / Commission* ('*Turkish Televisions*') [2001] ECR II-1337, at paragraph 218; and Case T-329/00, *Bonn Fleisch Ex- und Import / Commission* [2003] ECR II-287, at paragraph 64.

<sup>271</sup> Case C-104/01 *Libertel* [2003] ECR I-3793, at paragraph 59; and Case C-29/05 P *OHIM / Kaur and Bayer* [2007] ECR I-2213.

<sup>272</sup> Chiti, *Derecho Administrativo Europeo...*, at 245.

<sup>273</sup> First provided in article 190 of the EEC Treaty, today article 296 TFEU states: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."



established that a proper statement of reasons shall always support the decision taken. Later, it detailed that decisions must enumerate the facts forming the legal basis of the measure and the considerations which led to the adoption of such decision<sup>275</sup>. The obligation to state the reasons is aimed; firstly, at limiting the scope of discretionary powers of the executive<sup>276</sup>; secondly, at allowing the European judicature to exercise its powers of review of the legality of the decision<sup>277</sup>; and, thirdly, from the perspective of the individual, at enabling the concerned person to defend their rights with prior knowledge of the reasons of the contested decision<sup>278</sup>.

Besides these core procedural rights, some more procedural rights have been progressively introduced, either by the Court of Justice like the right to a reasonable duration of the procedures<sup>279</sup>; or by written law, like the right to address the institutions and advisory bodies of the Union in any of the Treaty languages and to

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<sup>274</sup> Case 18/57, *Nold / High Authority* [1959] ECR (English special edition) 41, page 52: "...from this it appears that the reasons for decisions 16/57, 17/57 and 18/57 neither on their own nor by reference to the 1956 decisions contain a sufficient and proper statement of the factual and legal considerations on which the contested decisions are based. They thus do not permit review by the court..."

<sup>275</sup> 41/69, *Chemiefarma / Commission* [1970] ECR 661, paragraph 76. The same stance was adopted in later case law; for instance, Case C-17/99 *France / Commission* [2001] ECR I-2481, at paragraphs 35 and 36; Case C-310/99 *Italy / Commission* [2002] ECR I-2289, at paragraph 48; and Joined Cases T-141/99, T-142/99, T-150/99 and T-151/99, *Vela Srl and Tecnagrind SL / Commission* [2002] ECR II-4547, at paragraph 168.

<sup>276</sup> Jürgen Schwarze, "Judicial Review of European Administrative Procedure", 68 *Law and Contemporary Problems* (2004), 85-105, at 105.

<sup>277</sup> Case 322/81, *NV Nederlandsche Banden-Industrie Michelin / Commission* [1983] ECR 3461, paragraph 15; and Joined Cases 43 and 63/82, *VBVB & VBBB / Commission* [1984] ECR 19, paragraph 58.

See further Francesca Bignami, "Creating European Rights: National Values and Supranational Interests", 11 *Columbia Journal of European Law* (2005), 241-352, at 345.

<sup>278</sup> Case 350/88, *Société Francaise des Biscuits Delacre SA / Commission* [1990] ECR I-395, paragraph 15:

"the statement of grounds [...] must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights"

Also, Case C-113/00, *Spain / Commission* [2002] ECR I-7601, at paragraph 47; and Case T-199/99, *Sgaravatti Mediterranea Srl / Commission*, [2002] ECR II-2289, at paragraph 100.

<sup>279</sup> Joined Cases T-213/95 and T-18/96, *Certificatie Kraanverhuurbedrijf (SCK) / Commission* [1997] II-1739, at paragraph 56; and C-238/99 P, *Limburgse Vinyl Maatschappij / Commission* [2002] ECR I-8375, at paragraph 164.

obtain a reply in the same language<sup>280</sup>, or the right to a reasonable duration of the proceedings<sup>281</sup>.

However, the case law of the Court of Justice does not provide the necessary legal certainty as for the extent of certain aspect of those procedural rights that have not been codified in an act of general scope<sup>282</sup>; and there is an ambivalent approach on the conception of those rights as to whether the focus shall be put on the interest goals advanced by the rights of defence or on its individual protection regardless of its contribution to the public interest<sup>283</sup>. The controversy surrounding the different approaches concerning the extent of individual procedural rights adopted by the Court of First Instance and the Court of Justice in cases like *Monsanto / Commission*<sup>284</sup> and *Reynolds / Parliament*<sup>285</sup> provides evidence for this lack of consistency.

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<sup>280</sup> Article 20(2)(d) TFEU, as well as article 41(4) Charter of Fundamental Rights. This right was first recognised in article 21(3) of the TEC in its consolidated version of Amsterdam. *See further* Bruno de Witte, “Language Law of the European Union: Protecting or Eroding Linguistic Diversity?”, in R. Craufurd Smith (ed.), *Culture and European Law*, Oxford University Press (Oxford, 2004)205-41.

<sup>281</sup> Francesca Trimarchi Banfi, “Il diritto ad una buona amministrazioni”, in Mario P. Chiti and Guido Greco, *Trattato di Diritto Amministrativo Europeo. Tomo I*, Giuffrè Editore (Milan, 2007), 49-85, at 63.

<sup>282</sup> *See further* Hans Peter Nehl, *Principles of Administrative Procedure in EC Law*, Hart Publishing (Oxford, 1999), 98.

<sup>283</sup> On the oscillation of both approaches in the case law of the Court of Justice, *see* Eric Barbier de La Serre, “Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends”, 12(2) *European Public Law* (2006), 225-50, at 225.

<sup>284</sup> Case T-112/97, *Monsanto / Commission* [1999] ECR II-1277, and Case C-248/99 P *France / Monsanto and Commission* [2002] ECR I-1. While the CFI understood that there had been a breach of the duty of care, the Court of Justice found that the interests of all the parties concerned had been weighed, namely, on the one hand, the interest of the institution in not having to follow a highly burdensome decision-making procedure involving reference to the Regulatory Committee and, on the other hand, the legitimate interest of an undertaking in not having to delay the implementation of its marketing plans in the expectation that a moratorium on the marketing of the product in question may soon be lifted. Thus whereas the CFI took a rather individual rights based approach, the Court of Justice showed more deference for public interest.

<sup>285</sup> Case T-237/00, *Reynolds / Parliament*, [2002] ECR, II-163, and Case C-111/02 P *Parliament / Reynolds* [2004] ECR I-5475, cited in Barbier de La Serre, “Procedural Justice...”, at 226. The case concerns an official may seconded to a post in one of the political groups in the Parliament. The political group concerned has discretion to choose the staff it wishes to engage to serve temporarily in posts in that group as well as to terminate the latter’s engagement. However, the CFI considered that the secondment cannot be concluded automatically without regard to the nature of the procedure brought against the official and that the appointing authority was under an obligation to give the official concerned a proper hearing before adopting such a decision. The Court of Justice quashed that ruling and argued that the termination declared by the appointing authority without previously giving the official a hearing was justified.

Hence, it is still doubtful whether the procedural rights integrated in the right to a good administration constitutes a standard or an essentially individual right<sup>286</sup>. Although the Court of Justice does not admit it explicitly, and European courts always proceed and deliberates on a case-by-case basis<sup>287</sup>, the overall trend points out towards the consideration as an individual right<sup>288</sup>. Indeed, recent derivations of the right to a good administration have a purely individual impact, such as the right not to be treated in a way that it harms business reputation and secrecy<sup>289</sup>; thus linking the right of good administration to individual fundamental rights.

The principle of proportionality, originating in the German legal tradition<sup>290</sup>, has been an essential general principle for the configuration of EU administrative

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<sup>286</sup> Reichel, “Between Supremacy and Autonomy...”, at 253.

<sup>287</sup> Nehl, *Principles of Administrative...*, at 98.

<sup>288</sup> Barbier de la Serre, “Procedural Justice...”, at 248. This work identifies the elements that make it more likely that the Rights of defence are acknowledged or increased in their protection, namely: “(i) the Institution enjoys a wide margin of appreciation; (ii) the party’s participation may contribute substantially to the overall quality of the decision; (iii) the procedure concerns a field in which the Institution enjoys strong investigative powers; (iv) the decision involves an appreciation of the party’s behaviour and/or could be injurious to that party’s reputation; (v) the exercise of the rights of the defence entails no excessive material costs; and (vi) failure to exercise the rights of defence would entail significant moral costs.”

<sup>289</sup> Case T-62/98, *Volkswagen AG / Commission* [2000] ECR II-2707, paragraph 281:

“It must be observed that those disclosures to the press were not restricted to expressing the personal views of the member of the Commission responsible for competition matters regarding the compatibility with Community law of the measures under examination, but also informed the public, extremely precisely, of the amount of the fine envisaged. In *inter partes* procedures which are liable to result in the imposition of a penalty, the nature and amount of the penalty proposed are by their very nature covered by business secrecy until the penalty has been finally approved and announced. That principle ensues, in particular, from the need to have due regard for the reputation and standing of the person concerned during a period in which no penalty has been imposed on that person. In the present case, the Commission must be held to have harmed the standing of the undertaking charged by causing a situation to arise in which that undertaking learned from the press the exact nature of the penalty which, in all probability, was to be imposed on it. To that extent, the Commission’s duty not to disclose to the press information on the specific penalty envisaged is not merely coterminous with its duty to respect business secrecy, but also with its duty of good administration. Finally, it should be borne in mind that the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules by undertakings that may result in the imposition of fines or periodic penalty payments (Case C-199/92 P *Hüls / Commission* [1999] ECR I-4287, paragraph 150; judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A No 73, and of 25 August 1987 *Lutz*, Series A No 123-A). That presumption of innocence is clearly not respected by the Commission where, prior to formally imposing a penalty on the undertaking charged, it informs the press of the proposed finding which has been submitted to the Advisory Committee and the College of Commissioners for deliberation.”

See further, Juan B. Lorenzo de Membiola, “La buena administración como estrategia promotora de la excelencia gestora”, 30 *Revista Aragonesa de Administración Pública* (2007) 445-58, at 455.

<sup>290</sup> Baer, “Equality: The Jurisprudence ...”, at 261. See also note 214.

law<sup>291</sup>. It has worked as a balancing principle between public interest and individual rights or, in more abstract terms, a liberal rights-based constitutional rationality and a strong commitment to the Union's public goals<sup>292</sup>. It has been enshrined in the provisions of primary law<sup>293</sup>, but more than those provisions, the essential content of the principle is to be found in the case law of the Court of Justice.

This principle can be inferred from rulings as early as in the 1950's<sup>294</sup>, and there is an early formulation of the principle so as to balance private and public interests in the opinion of the Advocate General Dutheillet de Lamothe in the case *Internationale Handelsgesellschaft*<sup>295</sup>. As it was subsequently developed by the Court of Justice since the *Fedesa*<sup>296</sup> ruling and several later cases<sup>297</sup>, taking on the German

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<sup>291</sup> Grainne de Búrca, "The Principle of Proportionality and its Application in EC Law", 13 *Yearbook of European Law* (1993), 105–50, at 106.

<sup>292</sup> Tor-Inge Harbo, "The Function of the Proportionality Principle in EU Law", 16(2) *European Law Journal* (2010), 158–85, at 158.

<sup>293</sup> Article 5(4) TEU: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

<sup>294</sup> See Alina Kaczorowska, *European Union Law*, Routledge (London, 2008), at 102; citing Case 8/55 *Fédération Charbonnière de Belgique / High Authority* [1956] ECR English special edition 292; and

Case 2/57, *Compagnie des Hauts Fourneaux de Chasse / High Authority* (ECR English special edition 199).

<sup>295</sup> Opinion of Advocate General Dutheillet de Lamothe delivered on 2 December 1970, in Case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1140, at page 1147: "the fundamental right invoked here –that the individual should not have his freedom of action limited beyond the degree necessary for the general interest– is already guaranteed both by the general principles of Community law, the compliance with which is ensured by the Court".

<sup>296</sup> Case C-331/88, *R / Minister of Agriculture and food (ex parte FEDESA)* [1990] ECR I-4023. The Court of Justice reasons on a case-by-case basis, but its considerations in this ruling are a paramount example of this threefold test in paragraphs 14 to 18:

"the legality of a measure adopted [...] can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.

On the question whether or not the prohibition is appropriate in the present case, it should first be stated that even if the presence of natural hormones in all meat prevents detection of the presence of prohibited hormones by tests on animals or on meat, other control methods may be used and indeed were imposed on the Member States by [other pieces of legislation]. It is not obvious that the authorization of only those hormones described as "natural" would be likely to prevent the emergence of a black market for dangerous but less expensive substances. Moreover, according to the Council, which was not contradicted on that point, any system of partial authorization would require costly control measures whose effectiveness would not be guaranteed. It follows that the prohibition at issue cannot be regarded as a manifestly inappropriate measure.

As regards the arguments which have been advanced in support of the claim that the prohibition in question is not necessary, those arguments are in fact based on the premiss that the contested measure is inappropriate for attaining objectives other than that of allaying consumer anxieties which are said to

legal tradition<sup>298</sup>, respect for the principle of proportionality involves a threefold test; firstly, the suitability test, *i.e.* whether the measure is the appropriate means to achieve a legitimate aim; secondly, the necessity test, *i. e.* whether the measure necessary to achieve is less restrictive means available; and thirdly, the proportionality test *stricto sensu* or balancing test, that is, whether a suitable and necessary measure notwithstanding imposes an excessive burden on the interests of the individual<sup>299</sup>

Although these three tests remain nominally untouched since the first formulation<sup>300</sup> an evolution is noticeable. Initially, the key element in the assessment was individual rights<sup>301</sup>. When deciding, the Court of Justice focused primarily on the extent to which an individual right was affected<sup>302</sup> to determine whether the measure was disproportionate. This was a consequence of the more careful consideration that the Court of Justice gave to fundamental rights, a phenomenon motivated by the push of the German *Bundesverfassungsgerichtshof*<sup>303</sup> to the European judges to adopt a more fundamental rights-based approach to European integration<sup>304</sup>.

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be unfounded . Since the Council committed no manifest error in that respect, it was also entitled to take the view that, regard being had to the requirements of health protection, the removal of barriers to trade and distortions of competition could not be achieved by means of less onerous measures such as the dissemination of information to consumers and the labelling of meat. Finally, it must be stated that the importance of the objectives pursued is such as to justify even substantial negative financial consequences for certain traders. Consequently, the principle of proportionality has not been infringed."

<sup>297</sup> Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, at paragraph 41; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, at paragraph 60; and Case C-189/01 *Jippes and Others* [2001] ECR I-5689, at paragraph 81.

<sup>298</sup> The *Bundesverfassungsgericht* had settled exactly the three same subprinciples, at Nicholas Emiliou, *The Principle of Proportionality in European Law*, Kluwer Law (The Hague, 1996), at 26-36.

<sup>299</sup> There are some commentators that argue that the second and third tests are in reality only one according to the case-law. In this sense, Takis Tridimas, *The General Principles of EU law*, Oxford University Press (Oxford, 2006), at 139.

<sup>300</sup> Case C-2/10, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* [2011] not yet published, at paragraph 73; Case C-127/07 *Arcelor Atlantique and Lorraine* [2008] ECR I-09895, at paragraph 59; and Joined cases C-37/06 and C-58/06, *Viamex Agrar Handels and Zuchtvieh-Kontor* [2008] ECR I-69, at paragraph 35.

<sup>301</sup> Emiliou, *The Principle of Proportionality...*, at 172.

<sup>302</sup> See for instance the opinion of AG Trabucchi in Case 118/75, *Watson and Belmann*, [1976] ECR 1201, at 1209:

"The requirements of life in a community and the fulfilment of the tasks incumbent on the State may call for adjustments in the definition of that degree of freedom which the subjective right of the individual represents. To constitute violation of the right, it is not enough that there should be any limitation whatever; the substance of the right must be affected."

<sup>303</sup> In particular the Judgment of 29 May 1974, 37 BVerfGE 271. This case is generally known as *Solange I* for the use of the same phrase in the court's decision:

This is not to say that the Court has become more deferent to the activity of the Institutions. On the contrary, when deciding what is a disproportionate measure, the Court of Justice has moved from a minimalist conception of only if manifestly inappropriate<sup>305</sup> to a more exigent check. This evolution was not necessarily by initiative of the Court of Justice but rather because the Institution participating in the legislative process committed themselves to move away from process of law-making to process of regulation<sup>306</sup>. This was best illustrated by the interinstitutional agreement on better law making of 2003<sup>307</sup> which fostered co-regulation and self-regulation, making the intervention of the European legislator conditional of the impossibility or inadequacy of the former mechanisms.

Nevertheless, there are hints in the current case-law that the judicial approach is changing towards a procedural rather than substantial analysis<sup>308</sup>. This change of approach can be evidenced in two recent judgements. In the *Vodafone* case<sup>309</sup> -where the ‘proportionality’ of the Commission’s decision to impose a mandatory Euro-tariff for roaming costs of all mobile telephone operators was debated<sup>310</sup> – the Court of

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“(Solange) As long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the German Constitution, a reference by a court in the Federal Republic of Germany to the *Bundesverfassungsgericht* in judicial review proceedings is admissible and necessary “. See further Elton R. Lanier, “Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge”, 11(1) *Boston College International and Comparative Law Review* (1988), 1-30, at 2-11.

<sup>304</sup> Harbo, “The Function of the Proportionality...”, at 164.

<sup>305</sup> Chalmers, Davies and Monti, *European Union Law*, at 369 citing Case C-84/94 *United Kingdom / Council* [1996] ECR I-5755, at paragraph 58; Case C-233/94 *Germany / Parliament and Council* [1997] ECR I-2405, at paragraphs 55 and 56; Case C-157/96 *National Farmers’ Union and Others* [1998] ECR I-2211, at paragraph 61.

<sup>306</sup> See Chalmers, Davies and Monti, *European Union Law*, at 369.

<sup>307</sup> Interinstitutional agreement on better law-making (OJ 2003 C 321, 1–5)

<sup>308</sup> Lenaerts, “The European Court of Justice...”, at 7.

<sup>309</sup> C-58/08, *Vodafone / Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999.

<sup>310</sup> Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ 2007 L 171, 32–40).



Justice investigated on the details of the elaboration of the Regulation<sup>311</sup>, and when it ascertained that the European lawmakers had done a proper job in terms of preparatory studies, stakeholders' participation, and impartial consideration of all relevant pieces of information, it concluded that the principle had not been breached<sup>312</sup>. In conclusion, the procedural rather than substantive assessment prevailed<sup>313</sup>.

The contemporary ruling in *Volker and Markus Schecke*<sup>314</sup> confirms the procedural approach can trigger inverse consequences. Related to the validity of certain provisions of two regulations<sup>315</sup> that mandated the publication of the names of beneficiaries of agricultural funds, the Court of Justice found the measure disproportionate as regards the individuals' fundamental right to privacy. The Court of Justice put the focus on the perspective on the fundamental rights<sup>316</sup>, but the reason why it found a breach of the principle of proportionality was primarily because the preparatory work was insufficient<sup>317</sup>.

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<sup>311</sup> *Vodafone...*, at paragraphs 39, 43, 45, 55, 59, 63 and 65. In particular, it examined the details of the Commission's impact assessment and explanatory memorandum before the draft regulation was forwarded to the European Parliament and the Council.

<sup>312</sup> *Ibid.*, paragraph 71.

<sup>313</sup> Martin Brenncke, "Case C-58/08, *Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010", *Common Market Law Review* (2010), 1793-1814, at 1809.

<sup>314</sup> Joined Cases C-92 and 93/09, *Volker and Markus Schecke GbR / Land Hesse* [2010] ECR I-11063.

<sup>315</sup> Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, 1-25) and Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) (OJ 2008 L 76, 28-30).

<sup>316</sup> Friederike Dratwa and Jana Werling, "Die erste Grundrechtsprüfung anhand der Charta der Grundrechte der Europäischen Union - oder: Aller Anfang ist schwer", 1 *European Law Reporter* (2011), 23-29.

<sup>317</sup> *Volker and Markus Schecke*, paragraphs 81-88: "81. There is nothing to show that, when adopting Article 44a of Regulation No 1290/2005 and Regulation No 259/2008, the Council and the Commission took into consideration methods of publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their personal data in particular. [...] 83. The institutions ought thus to have examined, in the course of striking a proper balance between the various interests involved. [...] 86. It follows from the foregoing that it does not appear that the institutions properly balanced, on the one hand, the objectives of Article 44a of Regulation No 1290/2005 and of Regulation No 259/2008 against, on the other, the rights which natural persons are recognised as having under Articles 7 and 8 of the Charter. "

Ultimately, the recent case law is already paving the way to a procedural approach of judicial review when it comes to the assessment of principles once thought to entail a purely substantive, results-oriented analysis, like the principle of proportionality. One could argue that out of the conflicting approaches to subjective rights described in the famous work of Ronald Dworkin “Taking rights seriously” the procedural approach has gained ground and will probably prevail in the future. This is why what happens in the process of making a decision, enacting a rule or even designing a policy is so important, in itself and later in the possible judicial review of the resulting act, rule or action.

In conclusion, the contribution of the Court of Justice has given prescriptive value to the notion of administrative procedures. Hence, even if not codified or even regulated, administrative procedures and its general principles bring about a general method of developing public activity, a notion undoubtedly applicable to national administration but also to the public powers at the European Union level<sup>318</sup>.

That being said, it is expected that, in the future, the concretisation and development of those principles will come not only from the European judges but also from the European legislator. The Treaty of Lisbon is a good example in this sense, although it generally goes no further than the enshrinement of general principles as formulated by the Court of Justice<sup>319</sup>. Rephrasing the words of Ronald Dworkin in his work “Taking rights seriously”, when the general principles are put into practice and used to decide hard cases, who makes the policy decisions, a judge or a legislator, matters. According to him, it is a more democratic approach to leave those policy decisions to elected bodies so judges limit their analysis to procedural issues<sup>320</sup>. So far, this generally has not been the case, but once the principles have been codified, it is expected that the legislator will have a more powerful say.

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<sup>318</sup> Giacinto della Cananea, “L’amministrazione europea” in Sabino Cassese, *Trattato di diritto amministrativo*, Giuffrè (Milan, 2003), 1797-1927, at 1871.

<sup>319</sup> Wolfgang Weiss, “Human Rights Protection after Lisbon”, in Martin Trybus and Luca Rubini (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Edward Edgar Publishing (Cheltenham, 2012), 220-38, at 221.

<sup>320</sup> Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, (Cambridge, MA, 1977), at 92.



### 3.4.5.- The codification of administrative procedures in the European Union

It was in the 1990's that the development and consolidation of EU administrative law led to some voices in the academic world to posit a general codification of EU procedures<sup>321</sup>. Today, the subject has become a classic issue of debate among scholar, with its supporters and detractors<sup>322</sup>, which is only logical considering the very different stance on codification of administrative procedures in the various European national traditions.

At the level of the academia, there is indeed a divergence of opinions as for the convenience of codification. Some authors have long advocated for a general harmonising administrative procedures regulation applicable throughout the EU and its Member States, stressing the benefits of codification and the many factors that make it necessary<sup>323</sup>. They draw an analogy with the codification in the US, which was long and controversial, but finally resulted in more efficiency for the public interest and easier judicial control<sup>324</sup>.

Other commentators argue that codifying would not only be controversial as to whether there is a sufficient legal base in the Treaties, but also that such a regulation would be very inefficient in the current context. For instance, professor Carlow points out that procedural rules are necessary, but they must be area-specific, otherwise there is a risk that general rules are quickly outdated, and thus shall be continuously

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<sup>321</sup> Like in other aspect of European administrative law, professor Schwarze was pioneer in unveiling a future issue of EU administrative law. See Schwarze, *Europäisches Verwaltungsrecht...*, at 1397. More early works on the subject: Christoph Vedder, "(Teil-)Kodifikation des Verwaltungsverfahrenrechts der EG?", in Jürgen Schwarze and Christian Starck (eds.), *Vereinheitlichung des Verwaltungsverfahrenrechts*, EuR,(1995), 75-93; Martin Shapiro, "Codification of Administrative Law: The US and the Union", 2(1) *European Law Journal* (1996), 26-47; Carol Harlow, "Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot", 2(1) *European Law Journal* (1996), 3-25; Wolfgang Kahl, "Hat die EG die Kompetenz zur Regelung des Allgemeinen Verwaltungsrechts?", *Neue Zeitschrift für Verwaltungsrecht* (1996), 865-69; Nehl *Principles of Administrative Procedure...*, at 169.

<sup>322</sup> Juli Ponce Solé, "EU law, global law, and the right to good administration", in Edoardo Chiti, *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparisons*, Springer (Berlin, 2001), 133-48, at 140.

<sup>323</sup> For example, Oriol Mir-Puigpelat, "La codificación del procedimiento administrativo en la Unión Administrativa Europea", en in Jens-Peter Scheider, and Francisco Velasco Caballero, *La unión administrativa europea*, Marcial Pons (Madrid, 2008), 51-85;

<sup>324</sup> Anne Meuwese, Ymre Schuurmans, and Wim Voermans, "Towards a European Administrative Procedure Act", 2(2) *Review of European Administrative Law* (2009), 3-35, at 5.

rewritten<sup>325</sup>. In such a way, a code would lose its usefulness and become more of a burden than a tool for efficient administration. In a similar vein, some New Governance theorists understand that codification might be counterproductive for the purposes of the development of some of the current trends of governance<sup>326</sup>.

In practice, however, the scholarly debate among the supporters of codification, or at least some legislative systematization of the existing rules and principles, takes places considering less maximalist options. In the current state of affairs two main alternatives have been postulated:

On the one hand, a relatively precise administrative procedure act. Within this alternative, the scope of the European act has been debated so as to be limited to the EU administration only (including the Commission and the different agencies) or to include also de administrations of member States when they execute or cooperate in the execution of EU law. The more far-reaching proposal to have a fully harmonising act including national administrative legislations too would encounter the opposition of Member States, each with a different legal tradition as we have seen, and some would argue the breach of the subsidiarity principle<sup>327</sup>.

A codification would be in line with the traditions of most Member States with codes of administrative procedure. However, there would be a difference between those general procedural acts which are only applicable to one administrative level, like the German *Verwaltungsverfahrensgesetz* which is only binding to the public administration at the federal level, and those containing general principles applicable to all administrative bodies, including regions and municipalities, like the Spanish *Ley de Procedimiento Administrativo Común* and the Italian *Nuove norme di*

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<sup>325</sup> Carol Harlow, “European Administrative Law and the Global Challenge”, *RSC Working Paper*, No 98/23, available at <http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Publications/WorkingPapers/9823.aspx#85>

<sup>326</sup> Dawson, *New Governance...*, at 70.

<sup>327</sup> Mir Puigperlat, “La codificación del procedimiento...”, at 81; and Carol Harlow, “European Administrative Procedure: the European Union as Exemplar”, in Sabino Cassese *et al.*, *Lisbon Meeting on Administrative procedure; Functions and Purposes of the Administrative Procedure: New Problems and New Solutions*, Institute for Legal and Political Sciences of the Lisbon University Faculty of Law, 37-52, available at [http://www.icjp.pt/sites/default/files/media/e-book\\_international\\_isbn.pdf](http://www.icjp.pt/sites/default/files/media/e-book_international_isbn.pdf), at 48.

*procedimento amministrativo*<sup>328</sup>. As we will see afterwards<sup>329</sup>, the European act shall be closer to the latter alternatives than to the German model, among other things, because the German alternative reflects the constitutional limitation of shared spheres of competence and, more generally, cooperation between *Bund* and the *Länder*<sup>330</sup>. The determination of the scope of the European act is an essential question for the development of this work.

The codification should take the form of a regulation that should be precise<sup>331</sup>, but not so much to impede for flexibility in the areas where specific provisions are needed; and that it would be a general procedure applicable only if there is no sector-specific law, in which case, except for perhaps essential mandatory rules of principle, the special regulation would be prevalent.

On the other hand, there are less ambitious proposals which posit a soft-law instrument for general principles coupled with sector-specific regulations. This would be a more conservative approach, which basically represents the *status quo*<sup>332</sup>. The case-law of the Court of Justice, as previously examined, counts at present as a source of systematization for general principles. The EU code of good administrative behaviour<sup>333</sup> is already a clear example of a simple soft-law instrument, and the vertical regulations of different procedures are proliferating<sup>334</sup>. These alternatives do not add any valuable systematisation or, for that matter, legal certainty to the current situation.

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<sup>328</sup> Jaques Ziller, “¿Es necesaria una ley de procedimiento administrativo par las instituciones de la Unión? Comentarios preliminares y perspectivas”, in Mercedes Fuertes López (ed.), *Un Procedimiento Administrativo para Europa*, Aranzadi (Pamplona, 2012), 97-130, at 118.

<sup>329</sup> See Section 6.2.3.

<sup>330</sup> Michael Fehling and Sasha Arnold, “Interrelaciones administrativas en el ordenamiento jurídico alemán. Novedades introducidas por la reforma del federalismo”, in Jens-Peter Scheider and Francisco Velasco Caballero, *La unión administrativa europea*, Marcial Pons (Madrid, 2008), 109-23, at 116, citing Josef Isensee, “Idee und Gestalt des Föderalismus in Grundgesetz”, in Josef Isensee and Paul Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland IV*, Hüthig Jehle Rehm (Munich, 1999), 181.

<sup>331</sup> A code not very detailed would resemble more the Italian or the Spanish Laws of Administrative Procedure than, for instance, the German one. See before section 3.3.2.

<sup>332</sup> Harlow, “European Administrative Procedure...”, at 49.

<sup>333</sup> Adopted by the Commission on 13 September 2000, and hence only applicable to it (OJ 2000 L 267, 63-66). Available at [http://ec.europa.eu/transparency/civil\\_society/code/docs/code\\_en.pdf](http://ec.europa.eu/transparency/civil_society/code/docs/code_en.pdf)

<sup>334</sup> Mir-Puigperlat, “La Codificación del Procedimiento...”, at 65.

The Institutions have also stepped in the debate. The European Parliament showed a keen interest on the subject, and decided to set up a Working Group on EU Administrative Law within the Committee of Legal Affairs<sup>335</sup>, which concluded in 2011 with a working document that recommended the enactment of a piece of legislation providing for a general procedure limited to the direct EU administration<sup>336</sup>. The plenary of Parliament adopted a resolution urging the Commission to draft a legislative initiative<sup>337</sup> on a law of administrative procedure in the European Union<sup>338</sup>. The resolution posits that the regulation shall codify two aspects. Firstly, it should contain several general principles<sup>339</sup>, most of which have already been established in detail by the Court of Justice<sup>340</sup>. Others could be found in secondary legislation<sup>341</sup> or soft-law instruments<sup>342</sup>. Secondly, it shall provide for

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<sup>335</sup> The working group was established in July 2010, concluding its work in October 2011. The benefits considered by the Working Group could be classified in (a) enhances legal certainty; (b) enhanced legal and policy consistency; (c) enhanced compatibility between EU and member State law; and (d) reduced burden for administrators, lawyers and judges. *See* in detail the research paper based on the experience of member States: “European Added Value Assessment on a Law of Administrative Procedure of the European Union. Aspects relating to the efficiency of the EU administration”, Research paper by Blomeyer & Sanz available at <http://www.europarl.europa.eu/committees/en/juri/studiesdownload.html?languageDocument=EN&file=79890>

<sup>336</sup> Working Document. State of Play and future prospects for EU administrative law of 19 October 2011 submitted to the Committee on Legal Affairs by the Working Group on EU Administrative Law; available at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/dv/juri\\_wdadministrativelaw/\\_juri\\_wdadministrativelaw\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/juri_wdadministrativelaw/_juri_wdadministrativelaw_en.pdf)

<sup>337</sup> Based on article 225 TFEU. This resolution is not binding upon the Commission, but if it does not submit such proposal, it shall inform the European Parliament of the reasons.

<sup>338</sup> European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0004&language=EN#BKMD-4>

<sup>339</sup> Recommendation 3 of the EP Resolution.

<sup>340</sup> This is the case of the principle of lawfulness (or legality), the principle of non-discrimination and equal treatment, the principle of proportionality, and the principle of legitimate expectations.

<sup>341</sup> The principle of respect for privacy has been provided for in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, 1–22). Likewise, the principle of transparency is regulated in

Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, 43–48).

<sup>342</sup> The principle of efficiency and service was included in the Code of good administrative behaviour, *see* note 333.

certain rules governing administrative decisions, again, many of which had already been recognised by the case-law of the European courts, like the right to be heard<sup>343</sup> or the duty to state reasons<sup>344</sup>, or the right to have one's affairs dealt with a reasonable time-limit<sup>345</sup>.

The resolution has formally put codification of administrative procedures on the agenda of the Institutions<sup>346</sup>, even with a limited scope, as it is restricted to direct implementation. All process of codification entails a long period of ripening, as was the case in countries that enacted general acts of administrative procedure<sup>347</sup>, and, considering the width and depth of the debate on the codification of administrative procedures<sup>348</sup>, some authors argue that we are in a pre-codification period<sup>349</sup>. The new Article 298 TFEU, read in connection with Article 41 ChFR, provides a legal basis for the envisaged codification<sup>350</sup>.

The strongest reason to codify administrative procedure is to end with the current normative fragmentation and thus comply with an essential principle of

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<sup>343</sup> Recommendation 4.4 of the EP Resolution.

<sup>344</sup> Recommendation 4.8 of the EP Resolution.

<sup>345</sup> In the absence of *lex specialis* recommendation 4.5 of the EP Resolution speaks of three months.

<sup>346</sup> Harlow, "European Administrative Procedure...", at 46. Moreover, the Swedish presidency of the Council in 2005, for instance, commissioned a detailed research on the subject Swedish Agency for Public Management, Principles of Good Administration in the Member States of the European Union (2005). Available at:

<http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf>. Nevertheless, the document points out the different interpretation of the general principle of administrative procedure, thus making a codification at the EU level more complex.

<sup>347</sup> Particularly, the process took years in the case of the German *Verwaltungsverfahrensgesetz* and the United States' Administrative Procedure Act.

<sup>348</sup> Just to illustrate this statement, at the academic level the leading network of European administrative law professors ReNEUAL has a central project of research on administrative procedural law of which the issue of codification occupies a major position (see [www.reneual.eu](http://www.reneual.eu)). At the level of the EU Institutions, there is no less importance awarded to the subject, for example see workshop on EU administrative law: state of play and prospects organised by the European Parliament in León (Spain). The briefing notes are available in the link [http://www.europarl.europa.eu/RegData/etudes/divers/juri/2011/453215/IPOL-JURI\\_DV\(2011\)453215\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/divers/juri/2011/453215/IPOL-JURI_DV(2011)453215_EN.pdf)

<sup>349</sup> Mir-Puigpelat, "La codificación del procedimiento...", at 53.

<sup>350</sup> Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2012), at 323, and Ziller, "¿Es necesaria una ley...", at 99. Although some express their reservation and raise their doubts as to whether or not article 298 TFEU can be a sufficient legal base, like Harlow, "European Administrative Procedure...", at 47.

administrative law; legal certainty<sup>351</sup>. Current rules of administrative procedure have been described by professor Nehl as a patchwork codification tailored to the specific requirements of sectorial policy implementation. They are barely consistent with one another and suffer from serious gaps, the most serious of which is individual protection<sup>352</sup>. Many of those gaps cannot be avoided by the creativity of the Court of Justice<sup>353</sup>.

Secondary law contains many different provisions that can be classified in:

- General acts, or limited codification with a horizontal dimension, *i. e.* with rules applicable to all or many administrative procedures<sup>354</sup>. This includes the regulation on the language regime<sup>355</sup>; staff regulation<sup>356</sup>; regulation on periods, dates and time limits<sup>357</sup>; regulation on access to documents<sup>358</sup>; regulation on data protection<sup>359</sup>; financial regulation<sup>360</sup>; the executive agencies regulation<sup>361</sup>; and the committology regulation<sup>362</sup>.

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<sup>351</sup> Nieto-Garrido and Martín Delgado, *European Administrative Law...* at 116-117.

<sup>352</sup> Nehl, *Principles of European Administrative...*, at 188.

<sup>353</sup> Päivi Leino-Snadberg, “Deficiencias del Derecho administrativo europeo: lagunas jurídicas, fragmentación y perspectivas de un futuro mejor”, in in Mercedes Fuertes (ed.), *Un Procedimiento Administrativo para Europa*, Aranzadi (Pamplona, 2012), 431-60, at 441.

<sup>354</sup> Oriol Mir-Puigpelat, “Razones para una codificación general del procedimiento de la administración de la Unión”, in in Mercedes Fuertes (ed.), *Un Procedimiento Administrativo para Europa*, Aranzadi (Pamplona, 2012), 131-65, at 141.

<sup>355</sup> Regulation No 1 determining the languages to be used by the European Economic Community of 15 April 1958.

<sup>356</sup> Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ English special edition: Series I Volume 1968(I), 30 - 36).

<sup>357</sup> Regulation (EEC, Euratom) No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ English special edition: Series V volume 1952-1972, 88.)

<sup>358</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, 43 – 48).

<sup>359</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, 1–22).

<sup>360</sup> Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, 1-97).

-Special acts, or area-specific rules at the vertical dimension, which contain details, often complete, rules on certain administrative procedures<sup>363</sup>.

A second factor is democratic legitimacy<sup>364</sup>. In a field as sensitive for individual rights as administrative procedures, the formulation and specification of general principles only by the EU judges is unsatisfactory from a democratic rationale. Likewise, in absence of *de minimis* general rules, it is objectionable that the Commission or even agencies are free to determine certain aspects of administrative procedures. An ordinary legislative procedure with the intervention of the European Parliament would be the appropriate normative path and institutional source to regulate the major aspects of administrative procedures<sup>365</sup>.

Furthermore, there are other factors, such as the enhancement of individual rights and guarantees by making them more simple to know by citizens, the efficiency of administrative actions thanks to a unified legal framework, and the opportunity to innovate, taking into account all consolidated know-how of the national codifications<sup>366</sup>. The danger of ossification<sup>367</sup>, pointed out by some of the sceptics of codification as a major drawback could be overcome by making rules general in

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<sup>361</sup> Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (OJ 2003 L 11, 1–8).

<sup>362</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011 L 55, 13–18.

<sup>363</sup> Examples of such acts are the Regulations and Directives for the authorisation of certain products in the internal market which will be examined in section 4.4, like Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, 1–47); or Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, 1–849).

<sup>364</sup> Mir-Puigpelat, “Razones para una codificación...”, at 154.

<sup>365</sup> Nieto-Garrido and Martín Delgado, *European Administrative Law...* at 117.

<sup>366</sup> Mir-Puigpelat, “La codificación del procedimiento...”, at 75–78.

<sup>367</sup> Renaud Dehousse. “Beyond representative democracy: constitutionalism in a polycentric polity”, in Joseph H. H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge University Press (Cambridge, 2003), 135–57, at 152.



nature, avoiding excessive substantive uniformity<sup>368</sup>, and, except for certain basic norms that could not be abrogated in detriment of the citizen, applicable only in the absence of a special regulation. As Ziller has underlined, codification at the national level has not prevented a growth of area-specific procedural regulations<sup>369</sup>, precisely in this state of affairs, a codification would make it all more coherent<sup>370</sup>.

There is an additional factor bearing particular relevance for the purposes of this work that has been largely neglected by authors discussing codification. As it was largely commented in the first chapter, the development of EU public administration is shifting towards patterns of intense cooperation with national authorities. It is for this reason too, increasingly more important as these schemes proliferate, that codification is so urgent<sup>371</sup>. A clear procedural framework is critical to meet the challenges that new administrative schemes entail, an idea that will be further explored.

It is for that reason that it would be a mistake to limit the subjective scope of the regulation to the EU administration when acting in direct administration procedures, as the European Parliament has initially postulated. The main problems that should be tackled are precisely in administrative procedures where cooperation with national authorities is key. When the European legislator postulated for such limited subjective scope, it probably had in mind the traditional distinction between direct and indirect administration<sup>372</sup> –the latter pertaining to the administrative powers of national authorities–, but as we have seen in the previous chapter this vision is no more than an illusion with little resemblance to reality.

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<sup>368</sup> Mir-Puigpelat, “La codificación del procedimiento...”, at 78.

<sup>369</sup> Ziller, “¿Es necesaria una ley...”, at 107.

<sup>370</sup> Mir-Puigpelat, “La codificación del procedimiento...”, at 76. Indeed, many see administrative codification as a manifestation of more general integrative movement which is visible in other fields like civil law (referred to as *ius commune*) and criminal procedure (referred to as *corpus iuris*). However, for administrative procedures the European legal base is much more solid.

<sup>371</sup> Jens-Peter Schneider, “Estructuras de la Unión Administrativa Europea – Observaciones introductorias”, in in Jens-Peter Schneider, and Francisco Velasco Caballero, *La unión administrativa europea*, Marcial Pons (Madrid, 2008), 25-50, at 37-40, citing Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverband*, Duncker (Berlin, 2004), at 353.

<sup>372</sup> Nieto-Garrido and Martín Delgado, *European Administrative Law...* at 117.



Even the concluding document of the working group appointed by the European Parliament stresses that enhanced compatibility between EU and Member States law is one of the main objectives. Hence, when cooperation between the two takes place, the European law shall rule procedural aspects of such cooperation.

It has been acknowledged, even by the most prominent supporter of a wide-reaching codification<sup>373</sup>, that there are serious doubts as to whether the European law can directly affect national administrative procedures<sup>374</sup>. However, prominent administrative law scholars like della Cananea have advocated for the competency of the Union to regulate even the execution by Member States of EU law<sup>375</sup>, *i.e.* indirect administration. Professor Ziller, who also admits the impossibility of codifying national administrative procedures with a European regulation, postulates that the rules and principles of the future act shall be applicable to the forms of cooperation between the Union and member States administrative authorities<sup>376</sup>.

This solution is furthermore consistent with the principle of subsidiarity, mainly burdened by a full harmonisation, because there is no way to proceduralise cooperation between the Union and national public administration at an inferior normative level than that of the EU.

This outline of the codification movement provides evidence that there is an emerging consensus among the academia and the Institutions with normative powers that a regulation codifying administrative procedures shall be enacted. It is an appropriate opportunity to tackle with a general norm many of the challenges and shortcomings that composite procedures present, and thus address the numerous procedural issues that remain open. In this vein, it is imperative to bring into the debate the question as to what shall be the appropriate scope of such act.

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<sup>373</sup> Mir Puigperlat, “La codificación del procedimiento...”, at 81.

<sup>374</sup> Even though, indirectly, it is to be expected that some kind of convergence will naturally follow a future European act of administrative procedure.

<sup>375</sup> Della Cananea, “I procedimenti amministrativi...”, at 530.

<sup>376</sup> Ziller, “¿Es necesaria una ley...”, at 118.

### 3.4.6.- Types of administrative procedures from the EU perspective

This last section intends to offer a useful classification of administrative procedures as regards EU law. It thus links the category of EU procedures with the core notion of the thesis. The delimitation of composite procedures entails a definition *a contrario*. Composite procedures must qualify as those which are neither purely national nor exclusively EU administrative procedures. The delimitation of this grey area when composite procedures are located is not an easy task. Any remote intervention of EU Member States in the adoption of an act does not render it “composite”, few or no procedures would then be purely European. Identifying the features that a composite procedure shall gather is essential for the further analysis of the legal challenges they present.

The classic divide direct/indirect administration *prima facie* reflects the two big categories of administrative procedures. In cases where execution of EU policies is carried out by the very EU Institutions and agencies, we are in presence of a purely EU administrative procedures, in cases where the execution corresponds to Member States, national administrative procedures come into play. In reality, the distinction is more complex.

EU administrative procedures are relevant first of all in areas of direct administration. Where the EU public administration is in charge of all the phases of the policy cycle and, specifically, in the execution of EU policies, procedures are purely European. Those areas are normally related to the exclusive competencies of the Union<sup>377</sup>. The administrative proceedings established are the paradigm of pure EU administrative procedures and, as such, they are provided for in EU acts of direct application, the paradigm of which are regulations. Examples of those procedures

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<sup>377</sup> Article 3(1) TFEU:

“1. The Union shall have exclusive competence in the following areas:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.”

include the Customs code<sup>378</sup> and Code's implementing provisions<sup>379</sup>; the Regulation on antitrust policy<sup>380</sup>; the Regulation on merger control<sup>381</sup>; the Regulation on State aid<sup>382</sup>; the Regulation on structural and cohesion funds<sup>383</sup>; the Regulation on single common market organisations<sup>384</sup> and the Regulation on ECB sanctioning powers<sup>385</sup>. Even in the fields governed by EU administrative procedures, there are different types of cooperation with Member States. For example, in the field of customs even if the procedure is completely regulated at the EU level, national authorities act merely as agents applying EU law. In the field of competition, there are several mechanisms of cooperation between the EU and national competition authorities.

A second important example of EU administrative procedures would be the purely internal proceedings of the Institutions<sup>386</sup>. It would be, for instance, the case of the administration and execution of the EU budget<sup>387</sup> and procedures contained in the staff regulations<sup>388</sup>.

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<sup>378</sup> Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, 1-88).

<sup>379</sup> Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, 1)

<sup>380</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, 1-25).

<sup>381</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, 1-22).

<sup>382</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 TFEU) (OJ 1999 L 83, 1-9).

<sup>383</sup> Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, 25-78)

<sup>384</sup> Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (OJ 2007 L 299, 1-149)

<sup>385</sup> Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions (OJ 1998 L 318, 4-7)

<sup>386</sup> Parejo, "El procedimiento administrativo...", at 235.

<sup>387</sup> Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002. (Official Journal 2012 L 298, 1-96)

<sup>388</sup> Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ English special edition: Series I Volume 1968(I), 30 - 36).

A third example would be the case of EU procedures concerning the link of the EU administration and private parties engaged in contractual activity. It would be the case of the procurement legislation<sup>389</sup>.

Finally, those procedures that concern sanctioning powers of the Institutions towards member States are also provided for in EU administrative procedures. The clearest example is the pre-contentious stage of the infringement procedure<sup>390</sup>, which is handled by the Commission.

On the other hand, national administrative procedures are those provided for in national, or even sub-national, instruments. The typical example would be the proceedings regulated in national law through which EU law is executed<sup>391</sup>. When executing EU law, Member States must balance the procedural autonomy that they enjoy with the loyal cooperation that they are bound to.

This results in a situation where their autonomy to determine administrative procedures as they see fit must be nuanced by increasing pressure for some degree of homogenisation, in such a way that national procedural law becomes increasingly functionalized to the requirements of effectiveness of substantive EU law<sup>392</sup>.

However, the fact that national procedural law is heavily influenced by EU law and that, when executing EU law, national authorities must have some sort of contact with EU entities does not qualify those procedures as `European`. Nevertheless, the distinction is subtle. Hence the relevance of conceptualising and assessing procedures

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<sup>389</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, 114–240).

<sup>390</sup> Article 258 TFEU. See in more detail Manuel Rebollo-Puig, “Los procedimientos administrativos previos al recurso por incumplimiento”, in Mercedes Fuertes (ed.), *Un procedimiento administrativo para Europa*, Aranzadi (Pamplona, 2012), 339-68.

<sup>391</sup> Parejo, “El procedimiento administrativo...”, at 235.

<sup>392</sup> An interesting analysis of the evolution towards the depreciation of the procedural autonomy can be found in Diana-Urania Galetta, *Procedural Autonomy of EU Member States : Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, Springer (Hedelberg, 2011)

qualifying neither as purely national nor as entirely European<sup>393</sup>. This will be done at length in the following chapter.

### 3.5.- Conclusions

'Administrative procedure' is an essential concept of Administrative Law that European Union law borrowed from European traditions. But in those traditions the dynamism of this legal concept has been extraordinary. The idea that administrative procedure is a sequence of formalities bearing no external relevance has long been overcome, but there are reminiscences lingering in national legislations and in EU law.

Administrative procedures bring about rights for the citizens, not necessarily linked to the final decision or rule adopted. This feature has phenomenal consequences for our analysis. Procedure has become a guarantee, and not only that the activity of the public administration is lawful, but also that it is transparent, that it accommodates legitimate interests of stakeholders, and that it gathers all the relevant pieces of information. All of it facilitates judicial review of administrative activity and strengthens the status of private parties. Although this trend has often come hand in hand with the progressive recognition of more and more individual procedural rights, it has not brought about codification of administrative procedures in all European countries. That is, codification is neither a prerequisite nor a consequence of the reinforcement of administrative procedures. However, codification does increase the level of legal certainty thanks to a simpler legal framework and facilitates a comprehensive and coherent spectrum of citizens' rights *vis-à-vis* the activities of public power.

Nowadays, administrative procedures face many challenges. Most of them are derived of the uptake of new governance approaches, and hence a more informal, less

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<sup>393</sup> Certain administrative procedures, while neither national nor European, are not composite procedures either. For instance, horizontal co-operation among member States' administrations related to the execution of EU law. Angel Manuel Moreno Molina, *La ejecución administrativa del derecho comunitario: régimen europeo y español*, Universidad Carlos III (Madrid, 1998), at 71 gives the example of an environmental impact assessment procedure of a Project with cross-border effects.

hierarchical fashion of carrying out administrative action. One of the most remarkable trends is cooperation between administrative actors, but also cooperation with the private sector. Public administration can hardly perform all of the tasks it is endowed with alone, and this phenomenon leads to many questions as regards the place and function of administrative procedures in those schemes of cooperation.

Little doubts have been raised about the existence of administrative procedures at the European Union level. On the contrary, the European legislator, European judges and legal scholarship have taken them for granted. They exist, even if they are still far from codified, but they do because of the peculiar, qualifying features of the EU, while this is not the case in international organisations. And there is a whole corpus of principles and rules developed by the Court of Justice and, more recently, based in the provisions of the Charter of Fundamental Rights, that shape a well-established doctrine of administrative procedures. Logically, the notion and legal effects of administrative procedures in the EU have evolved in parallel to the maturation of administrative procedures at the national level; hence, participation, transparency and accountability shape the new procedural rights recognised to the individuals.

After an analysis of the recent case-law of Court of Justice with regard to those principles and, notably, the principle of proportionality and the right to a good administration, it is possible to perceive an increasingly procedural stance on the assessment of administrative rules and actions, coming simultaneously as the individual rights-approach to judicial review. This has significant consequences for our analysis.

The old scholarly debate on the convenience of the codification of administrative procedures in the European Union has reached a new stage after the request of the European Parliament to the Commission for a proposal on a European general administrative procedures regulation. While we have seen that codification is not present in all European countries, it would entail a meaningful step in tackling many of the challenges that administrative procedures face today. The fact that the debate has reached the level of the pre-legislative debate all but increases the interest of the solutions we might propose with regard to composite procedures.

As we will see in the next chapter, composite procedures are probably the kind of EU administrative procedures most in need of codification. That is because the legal challenges that they raise are powerful and can only be tackled with a common framework law and a clear recognition of procedural rights. A general legal regime would help to avoid the many gaps in judicial review that we shall see later on. It is therefore a mistake to restrict the law to procedures of direct EU administration, as if the others were only indirect administration and thus remain in the so questioned procedural autonomy of member States.

Good procedures are essential to good substance. Appropriate procedural requirements contribute to quality outcomes. History shows that efficiency cannot justify lack of procedures and procedural rights, because indeed, administrative procedures are the best guaranty not only of liberty and individual rights, like Rudolf von Ihering argued several centuries ago<sup>394</sup>, but of the improvement of administrative rule and decision-making.

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<sup>394</sup> “Form is the sworn enemy of arbitrary rule, the twin sister of liberty. Because the mould keeps the lure of freedom as a counterweight to licentiousness, it draws the substance of freedom in solid sheets, that do not scatter from their demarcation, it strengthens them inside, and protects them from outside. Solid forms are the school of law and order and thus the freedom itself and a bulwark against external attacks - they can only be broken, but they do not bend.” Rudolf von Ihering, *Geist des Römischen Rechts auf den verschiedenen Stufen der Entwicklung*, Volume II, Part I, Breitkopf und Härtel (Leipzig, 1874), at 471.





## CHAPTER 4

### Composite procedures

- 4.1.- Preliminary remarks
- 4.2.- Composite procedures; concept, term and scholarly attention
  - 4.2.1.- *What are composite procedures?*
  - 4.2.2.- *Why the term 'composite procedures'?*
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#### ***4.1.- Preliminary remarks***

Composite procedures result from the reshaping of the European administrative structures towards a more co-operative EU-national model. This structural change is happening at the same time as a profound evolution in the concept of administrative procedure.

With the considerations of the two previous Chapters in mind, we arrive at the core element of the doctoral dissertation, which is the concept of composite procedures. ‘Composite procedures’ is a concept increasingly used by legal academia and it is generally accepted today. However, providing a definition of composite procedures, both simple and comprehensive, turns out to be as a very complicated task.

There is a tension between strictness and comprehensiveness. On the one hand, there is a need to put some limits to the large notion of proceduralised cooperation between the EU and Member States, so that the definition is relevant and has a clear delimitation. Otherwise, we would only be discussing the legal challenges of cooperation between the European public administration and its national counterparts. On the other hand, a very strict instance consisting on a list of clearly identifiable legal characteristics is counterproductive, as it leaves outside many situations whose legal problems also need to be tackled.

Precisely, as we will see in this Chapter, composite procedures have proliferated out of necessity, and the European legislator has established these procedures as a compromise solution for specific cases. A compromise that stems from the objective of harmonisation, concentration of information and centralisation of decisions, on one side, and from the protection of national powers or, just pragmatically, the fact that expert information resources are at the national level, on the other. The legislator did not have any particular pattern in mind when setting up these procedures, so it is only natural that this pattern can hardly be constructed academically. But it is a task that cannot be escaped. We have seen the background of the emergence of administrative procedural cooperation and a new phenomenon which we will call composite procedures. A

definition is necessary in order to proceed further in analysing the legal challenges, shortcomings and solutions that relate to composite procedures. When giving this definition we need to be aware that it will remain either too weak or too rigid. A description of the main examples of composite procedures will help to the conceptualisation.

#### **4.2.- Composite procedures; concept, term and scholarly attention**

##### *4.2.1.-What are composite procedures?*

The first difficulty regarding composite procedures is that there is no solid legal source to define it. As we will see, the EU secondary legislation establishes composite procedures in a purely fragmentary fashion, regulating the procedures on a case-by-case basis and without any general legal framework. Primary law, as we have seen, ignores composite procedures and assumes that indirect administration is the rule and direct implementation is the exception, as if nothing existed in-between<sup>1</sup>.

Moreover, the European judges have circumvented the notion of composite procedures. When confronted with a legal shortcoming stemming from the complex nature of composite procedure, the European Courts have put the focus on the specific problem of the case while avoiding to see a more general, far-reaching phenomenon. An example of this statement is the description of a composite procedure in *France Aviation*<sup>2</sup>, a case in which the right to be heard was declared infringed. The Court identified simply an administrative procedure with two differentiated stages without appreciating any peculiar characteristic. while indeed, the reason why the right to be heard had not been respected was precisely that in the scheme of cooperation it was not clear before whom the individual had a right to a hearing.

"The Court finds in *limine* that, in accordance with the relevant legislation described above, the administrative procedure which culminated in the adoption of the contested decision involved various stages, on the one hand, at national

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<sup>1</sup> See in particular section 2.2.4.

<sup>2</sup> Case T-346/94, *France Aviation / Commission* [1995] ECR II-284. This case will be analysed at length in section 5.2.2.

level, since the applicant submitted its application for repayment, together with supporting documents, to the French administration and, on the other, at Community level, since the French administration drew up the applicant's case and transmitted it to the Commission, which, after consulting a group of experts, declared the application for repayment to be unjustified."<sup>3</sup>

That is why, for a general conceptualisation of composite procedures, it is necessary to rely essentially on academic sources, although considering both the legislation and the case law on composite procedures, because neither secondary law nor the rulings of the Court of Justice deal with composite procedures in a general fashion, or name them like that, for that matter.

In a broad sense, one could argue that composite procedures are those administrative procedures in which both the European and the national public administrations intervene to reach a decision. In a public administration like the European one, so characterised by cooperation with national public administrations, it is easy to picture that a large part of the European administrative procedures would fit in that definition. This large understanding of composite procedures corresponds with the idea that some of the authors that have dealt with the subject-matter. The composite element of administrative procedures appears when both the European and national level of administration play a role in the design, enactment, implementation and enforcement of policies. Professor Herwig Hofmann defines composite procedures as multiple-step procedures with input from administrative actors belonging to different jurisdictions<sup>4</sup>, which entail highly integrated administrative procedural cooperation for development and implementation of EU policies<sup>5</sup>. Their main feature is that both national authorities and EU actors take part in making decisions in the administration of

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<sup>3</sup> *Ibid.* at paragraph 28.

<sup>4</sup> Herwig C. H. Hofmann, "Composite decision making procedures in EU administrative law", in Herwig C. H. Hofmann and Alexander H. Türk (eds.), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, Edward Elgar Publishing (Cheltenham, 2009), 136-67, at 136.

<sup>5</sup> Hofmann, "Composite decision making...", at 166.

European policies<sup>6</sup>. They go beyond the classic dichotomy of the "direct" and "indirect" implementation of EU law<sup>7</sup>.

From this broad perspective, composite procedures are sequences of procedural steps in which administrative bodies from the national administration and the European Union provide with a contribution to the final result, normally a decision at either level. The core element of the notion is that intense cooperation between national and European authorities crystallises in a procedural arrangement with different degrees of formalism.

This is a flexible approach that most scholars that have dealt with composite procedures would agree upon<sup>8</sup>. However, there is a problem to such definition regarding its limits. Most administrative procedures at the level of the European Union require some kind of intervention of the Member States, even in the form of a mere exchange of information. Similarly, at present, many national administrative procedures are largely influenced by European rules or actors, a phenomenon called by some authors the 'Europeanisation' of national administrations<sup>9</sup>. For this reason, it is difficult to set a clear borderline between those procedures with a minimal, negligible intervention of another administrative authority, perhaps in the form of a mere transmission of information, and those which, because the degree of cooperation is very intense, depart from a regular administrative procedure either at the European or at the national level. Thus, reliance on external data by a public administration might happen with respect to mere information supplied by private actors, third countries, or international organisations but

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<sup>6</sup> Giacinto della Cananea, "The European Union's mixed administrative proceedings", 68 *Law and Contemporary Problems* (2004), 197-218, at 198.

<sup>7</sup> Luis Ángel Ballesteros Moffa, "The Application of EU Law: Relevant Aspects of European Administrative Procedure", Workshop on EU administrative law: state of play and future prospects (León - Spain), at 94, available at <http://www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=59983>.

<sup>8</sup> In this sense, Eberhard Schmidt-Aßmann, "Structures and Function of Administrative Procedures in German, European and International Law", in Javier Barnes (ed.), *Transforming Administrative Procedure*, Global Law Press (Seville, 2008), 47-74, at 51; Mario Chiti, *Diritto Amministrativo Europeo*, Giuffrè Editore (Milan, 2011), at 469; Della Cananea, "The European Union's mixed ...", at 198; and Claudio Franchini and Giacinto della Cananea, *I principi dell'amministrazione europea*, G. Giapichelli Editore (Torino, 2013), at 195.

<sup>9</sup> See footnote 269 of the second chapter.

this element does not necessarily entail a substantial modification of the nature of the procedure.

As it will be explained with detail in the following Chapter, the actual legal challenges that composite procedures bring about happen when this cooperation is so intense that the input from one public administration on the administrative procedure followed by the other has legal consequences *per se*. In other words, the contribution of the 'other' level of public administration is not a mere source of information that the public administration in charge of the decision can use with full discretion. There must be a further element, the input has to be decisive or, at least, it has to have a determinant effect in the subsequent steps that the other public administration follows. The input must then be substantial. That happens, for instance, when a public administration receives an application and decides whether to proceed with it and forward it to the other administration or to declare it inadmissible, or when a report with a favourable opinion by another public administration is necessary in order to proceed to the final decision.

For the purposes of this doctoral dissertation, it is necessary to define a stricter concept that goes beyond the general notion of cooperation. Hence, a notion of composite procedures *stricto sensu* will be used throughout this thesis, and the examples that will be explained in this Chapter will usually pertain to this more rigorous understanding. Based on the assumption that the cooperation is intense within the framework of an administrative procedure at one level, the qualifying element for the presence of a composite procedure from this strict approach is that the contribution by the other administrative level is so relevant that it has a decisive effect on the outcome.

Consequently, what introduces a qualitative change in the nature of a procedure is the fact that the intervention of another administrative actor is binding upon the one that must take the final decision. Thus, for example, the fact that a report is necessary from another public administration would not be sufficient according to this strict approach. However, the intervention of another public administration in form of a report that has a direct and automatic impact on the procedure, producing legal effects irrespective of the appreciation of the authority in charge of taking the decision, does entail a substantial change in the nature of the procedure. This happens in such a way

because the authority in charge of taking a final decision is limited in its autonomy, and the intervening authority takes a relevant partial responsibility in the outcome of the procedure.

Procedures of such kind are the ones that raise relevant legal challenges, as we will see extensively in the next Chapter, regarding access to justice or the effectiveness of procedural rights like the right to be heard<sup>10</sup>. It can easily be understood that if the authority taking the decision is somehow bound by a previous procedural step that another public administration took charge of, the possibilities of a judicial review, for instance, is severely affected as the administration taking the final decision will not be responsible for possible mistakes that the 'other' public administration made. Similarly, one could envisage relevant questions on the obligation to give reasons or the right to be heard. These legal concerns do not arise with such intensity when there is a mere reliance on the information provided by another level of administration, but the administrative authority taking the final decision still takes responsibility for assessing this information and deciding freely on the whole.

Following those considerations, from this stricter point of view, composite procedures can be defined as administrative procedures in which both national and European administrative actors cooperate and share responsibility for the decision or measure adopted by one of them. More descriptively, composite procedures *stricto sensu* are administrative sequences in which actors from both the European and national public administration intervene and contribute with an input that is binding and cannot be overseen by the margin of appreciation of the authority that formally determines the final outcome of the procedure.

Nevertheless, one has to be aware that the strict definition could leave aside cases that have been considered composite procedures by the academia. Moreover, there are times when the presence of such binding character is far from clear, for instance, when the legislation does not state the binding character of a report prepared by national bodies of experts but, due to the very technical nature of the authorisation procedure, the

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<sup>10</sup> Sandra Antoniazzi, "Procedimenti amministrativi comunitari composti e principio del contraddittorio", in 3-4 *Rivista Italiana di Diritto Pubblico* (2007), 641-736, at 700.



European authorities -lacking the needed technical expertise- cannot in practice but follow the conclusions.

#### 4.2.2.-Why the term 'composite procedures'?

Legal academia identified that there was a notion of administrative procedures where European and national administration took relevant part. This phenomenon has been addressed this concept with different names by the authors.

For example, professor Schmidt-Aßmann referred to staged procedures, thus focusing on the different stages of the sequence<sup>11</sup>. For each different stage there are different actors whose participation is essential.

Another adjective that has been used by scholars is 'mixed'. The term mixed procedures refers to those procedures characterised by the addition or amalgamation of contributions by different authorities. In this vein, professor Della Cannanea argued that both national authorities and either the Commission or EU agencies take part in making decisions in the administration of EU policies<sup>12</sup>. They do not mirror a constitutional structure based on separated powers but, rather, highlight the interaction of these powers<sup>13</sup>, hence with an emphasis on the element of mixticity.

Finally, professor Mario Chiti, a leading scholar in the field of European administrative law, started to use the term *procedimenti composti*<sup>14</sup>, referring to the successive administrative organs that added their input to a single procedure, thus a procedure composed of different contributions. This terminology has been picked up by

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<sup>11</sup> Schmidt-Aßmann, "Structures and Function of Administrative...", at 51. A variant of this term can be found in work of political scientists, *see* for example, reference to 'multi-staged' procedures in Thomas Gehring, "Communicative Rationality in European Governance? Interests and Communicative Action in Functionally Differentiated Single Market Regulation", in Erik O. Eriksen, Christian Joerges and Jürgen Neyer (eds.), *European Governance, Deliberation and the Quest for Democratisation*, ARENA (Oslo, 2003), 57-140, at 126.

<sup>12</sup> Della Cananea, "The European Union's mixed ...", at 198.

<sup>13</sup> *Ibid.* at 198.

<sup>14</sup> Mario Chiti, *Diritto Administrativo Europeo...* at 469-70 (term also used in the first editions of this work).



other scholars. Professor Hoffman, for example, has extensively written on the topic of 'composite procedures'<sup>15</sup>.

Considering there is no other authority than legal doctrine for the name of this concept, since no reference to it can be found in the case-law or in the legislation, and the relative immaturity of its study, one could choose the term one deems more descriptive.

'Composite' is the most suitable adjective for the concept that this dissertation intends to analyse. Composite refers to an object or item made up of different things, parts or substances<sup>16</sup>. For our purposes, a procedure made up of the aggregation of the inputs of the diverse administrative authorities. Etymologically, the term is the most pertinent as it refers to the process of putting '*ponere*' together '*cum*' with a very straightforward translation to Latin languages<sup>17</sup>. This notion exists in German too<sup>18</sup>. It can be argued that this feature of aggregation is also present in the term 'mixed', meaning items that consists of things of substances of different origins or types<sup>19</sup>. However, the term composite puts the emphasis on the feature that those elements come together to conform something different and are not merely added up, going beyond a mere juxtaposition of procedural arrangements.

#### *4.2.3.-The increasing importance of composite procedures in legal academia*

Composite procedures have been subject to a systematic academic analysis only very recently, from the decade of 2000's. It was analysed extensively how the logic of cooperation has been overshadowing the logic of separation almost since the beginning of the European Communities, contrary to what was written on the Treaties<sup>20</sup>. Only after composite procedures have proliferated to the extent that they are now one of the most

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<sup>15</sup> Hofmann, "Composite decision making procedures...".

<sup>16</sup> Collins English Dictionary, HarperCollins Publishers (New York, 2003).

<sup>17</sup> Procedures composées, in French; procedimenti composti, in Italian; procedimientos compuestos, in Spanish; procedimentos compostos, in Portuguese; and procedurile compuse, in Romanian.

<sup>18</sup> Verbundverfahren.

<sup>19</sup> Collins English Dictionary, HarperCollins Publishers (New York, 2003).

<sup>20</sup> See section 2.1.4.

relevant and common mechanisms for the implementation of EU law, legal scholarship has begun to elaborate on them and their consequences in a comprehensive way.

Rather than a systematisation, or even a specific denomination of composite procedures, some legal scholars realised of the legal problems that some procedural arrangements characterised by intense cooperation between national and European administrations brought about.

From a political science and organisational point of view, scholars put the focus on the trend towards more cooperation in policy design and policy implementation before legal academia came up with the notion of composite procedures<sup>21</sup>.

Within legal scholarship, professor Casesse was one of the first scholars to realize that cooperation between European and national authorities was getting more and more intertwined to the extent of a substantive change of nature with a paper that was published in the 1980's<sup>22</sup>. Afterwards, there are more works that examine specific examples of cooperative procedural arrangements and the challenges they entail<sup>23</sup>. Former president of the Court of Justice, Professor Rodriguez Iglesias argued in the early 1990's<sup>24</sup> that these procedures of intense cooperation can be traced as far back as the 1960's, and offers the example of Directive 64/221/EEC<sup>25</sup> on the free movement of workers. He quickly identified the problem of access to justice as the main concern regarding these procedures.

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<sup>21</sup> Wolfgang Wessels, "Comitology: Fusion in Action. Politico-Administrative Trends in the EU system", 5(2) *Journal of European Public Policy*, (1998), 209-34.

<sup>22</sup> Sabino Cassese, "Theoretical Sketch of Cooperative and Multidimensional Nature of Community Bureaucracy", in Joseph Jamar and Wolfgang Wessels (eds.) *Community bureaucracy at the crossroads: L'Administration communautaire à l'heure du choix : actes du colloque Collège d'Europe*, De Temple (Bruges, 1985) .

<sup>23</sup> Albrecht Weber, "Il diritto amministrativo procedimentale nell'ordinamento della Comunità europea", 2 *Rivista italiana di diritto pubblico comunitario*, (1992), 393-412.

<sup>24</sup> Gil Carlos Rodriguez Iglesias, "Sui limiti dell'autonomia procedimentale e processuale degli Stati membri nell'applicazione del diritto comunitario", 1 *Rivista italiana di diritto pubblico comunitario* (2001) 5-28, at 5.

<sup>25</sup> Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ 1964 L 56, 850-857).

The approach at the beginning was on a case-by-case, identifying the shortcoming of specific procedures set up by European legislation. The *Borelli*<sup>26</sup> case triggered the attention of the academia<sup>27</sup>, and is often cited as the paradigm of the dysfunctionalities of the stilled not conceptualised composite procedures, which had proven relevant in practice and for which the Court of Justice did not provide a convincing solution. However, even when this ruling of the Court of Justice underlined some of the problems of composite procedures, legal scholars still did not address composite procedures in a systematic way, which proves the immaturity of the concept still in the 1990's.

As composite procedures became more frequent, at the expense of both national procedures (indirect administration) and purely EU procedures (direct administration)<sup>28</sup>, legal scholars began to elaborate the concept as a peculiar type of proceeding for the implementation of EU policies. It was professor Schmidt-Aßmann<sup>29</sup>, among the German scholars, and professor Chiti<sup>30</sup>, among the Italian scholars, that began to give composite procedures a special consideration as a different category of administrative procedure, to which they devoted a specific section of their manuals of European law.

Together with this more systematic treatment came the realisation that composite procedures were actually becoming the most common method for the implementation of EU policy<sup>31</sup>, in particular after the entry into force of the Lisbon

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<sup>26</sup> Case C-97/91, *Oleificio Borelli / Commission*, [1992] ECR I-6313. This judgement and its consequences will be explained later in section 5.3.5.

<sup>27</sup> As an example, Roberto Caranta, "Sull'impugnabilità degli atti endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione", *Foro Amministrativo* (1994), 752-61; and Eduardo García de Enterría, "La ampliación de competencias de las jurisdicciones contencioso-administrativas por obra del Derecho comunitario. Sentencia Borelli de 3 de diciembre de 1992 y artículo 5 CEE", 78 *Revista Española de Derecho Administrativo* (1993), 297-314. These academic publications only focus on certain legal problems highlighted by the judgement of the Court of Justice, but do not analyse composite procedures in general.

<sup>28</sup> Edoardo Chiti and Giacinto della Cananea, "L'attività amministrativa", in Giacinto della Cananea (Ed.), *Diritto amministrativo europeo. Principi e istituti*, Guiffre Editore (Milan, 2011), 103-30, at 112.

<sup>29</sup> In this respect, one of the first authors to describe the peculiar traits of this type of procedure was Eberhard Schmidt-Aßmann, "Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft", *Europarecht* (1996) 270-301.

<sup>30</sup> Mario Chiti, *Diritto Amministrativo Europeo*, ... 469-70.

<sup>31</sup> Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2012), at 70.

Treaty<sup>32</sup>. Since then, the scholarly focus on composite procedures has not ceased to increase. Today, the notion of composite procedures is generally accepted and the most notorious network of European administrative law researchers, ReNEUAL, admitted in its recent meeting in Brussels in 2014, acknowledged that composite procedures entailed many of the major challenges that European administrative law will have to confront in the coming years<sup>33</sup>.

#### *4.2.4.- Classification of composite procedures*

Similarly to the question of a definition of composite procedures, laying down a relevant classification of composite procedures is a difficult task due to the lack of general normative framework and the relative immaturity of the academic study of the subject-matter. Other factors that hinder a straightforward classification are the very features of composite procedures, which are not absolute and definite; as well as the dynamism of the context in which they operate, inasmuch as these procedures appear, expand and change on a case-by-case basis more and more frequently.

The most evident criterion for classification relates to the direction in which the procedure develops. Thus, a composite procedure can be initiated at the national level and be taken over by the European authorities which take the final decision. In this case, the procedure can be described as bottom-up composite procedure<sup>34</sup>. Examples of this procedure would be the procedure for the authorisation of pesticides<sup>35</sup> and the procedure

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<sup>32</sup> Chiti and della Cananea, "L'attività amministrativa...", at 114. For them, the fact that effective implementation of EU law is a matter of common interest that Member States are in charge of constitutes a clear omen of the proliferation of composite procedures.

<sup>33</sup> The Research Network on EU administrative law, ReNEUAL, discussed the draft model rules on EU administrative procedures that they had elaborated based on the work of several leading scholars on the field (professors Herwig Hofmann, Jens-Peter Schneider, Jacques Ziller, Oriol Mir Puigpelat, Joana Mendes, Deirdre Curtin, Giacinto della Cananea, and Paul Craig, all of them often cited in this thesis, were participating in the conference). In the report "Towards an EU Administrative Procedure Law? - Report of the ReNEUAL Conference in Brussels March 15 and 16, reference to composite procedures was frequent. In their assessment of the self-initiative report of the European Parliament they appeared very critical on the constraint that the envisaged European initiative of the Commission would only cover EU administrative procedures of direct implementation. More information on the conference and the draft papers and model rules can be found on [www.reneual.eu](http://www.reneual.eu) and <http://www.ombudsman.europa.eu/en/activities/calendarevent.faces/en/599/html.bookmark>.

<sup>34</sup> This criterion has been used, for example, by Della Cananea, "The European Union's mixed ...", at 201.

<sup>35</sup> See section 4.4.2.

for the authorisation of biocides<sup>36</sup>, where the admissibility of the application is assessed by national authorities, and then the dossier is forwarded to the European authorities. The inverse case, where the procedure starts at the level of the European Union and finishes with a national decision, would then be a top-down. Examples of such procedures would be the procedure to determine and grant ecolabels<sup>37</sup>, but they can be also be found in several areas where EU funds are managed and awarded by Member States<sup>38</sup>.

This criterion does not encompass the whole range of composite procedures. There are many examples of composite procedures started and finished at one administrative level of decision-making that end with a final decision at that level with a relevant contribution of another public administration. Examples of such procedures can be found in the field of medicines<sup>39</sup> and chemicals<sup>40</sup>.

As a result, a more comprehensive criterion of dual classification of composite procedures would be to look exclusively at the public administration that issues the final decision. This can indeed be an important standard for distinction. We will see that composite procedures that lead to a decision taken by the Commission or another Union's body are not only more numerous but also more relevant for the purposes of our analysis. From the perspective of European Union law they are more relevant because it immediately becomes evident that the gaps in procedural rights or access to justice affect an administrative decision taken by the Union. On the contrary, on the cases of decisions issued by a national administrative authority, national law comes into play. We will see how these procedures also provoke legal *lacunae* which sometimes national administrative law cannot solve. Coordination mechanisms are necessary in both, but it is in the first type of procedures that solutions are more urgent.

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<sup>36</sup> See section 4.4.5.

<sup>37</sup> See section 4.4.9.

<sup>38</sup> Della Cananea, "The European Union's mixed ...", at 200.

<sup>39</sup> In particular, the centralised procedure is initiated and finished at the European level, with an assessment report which the national authorities take charge of, *see* section 4.4.4.

<sup>40</sup> See section 4.4.6.

Another classification can be formulated based on the number of intervening administrations. Most composite procedures involve a national administration and the European public administration. This scheme, however, can further be complicated. In some cases, several public administrations might take part in the procedure. For instance, in the procedure for the authorisation of pesticides and the centralised procedure for the authorisation of pharmaceuticals intended for human use several co-rapporteurs might be appointed. The difference is more substantial when the miscellaneous national authorities interact with each other more besides with the European ones. This happens, for example, in the mutual recognition procedure in the field of medicines, once an authorisation to market a medicinal product has been granted at the national level in one Member State. The procedure does not remain at a purely interstate level, because in case of disagreement the Commission might be called to intervene, eventually settling the dispute<sup>41</sup>. Nevertheless, these tripartite composite procedures are rare.

The possibility exists that the composite element of administrative procedures lies in the cooperation among Member States only. Professor Hofmann calls these procedures horizontal composite procedures in contrast to the vertical EU-Member States composite procedures<sup>42</sup>. The cases just mentioned where there is an intervention of the Union are not strictly horizontal procedures, and could be described as triangular procedures.

The most relevant criterion of distinction, however, for the purposes of this thesis is related to the degree of intervention of the Administration which does not issue the final decision. We already commented on this point when defining composite procedures and indicated that the boundaries between a composite procedure and a traditional administrative procedures that relies on a certain cooperation by another public administration was on the legal effects of the input of one public administration on the procedure that ends with a decision by the other. We will call composite procedures *stricto sensu* those procedures in which there is a clear binding element in the contribution of the public administration that does not take the decision.

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<sup>41</sup> See for details Section 4.4.4.

<sup>42</sup> Herwig H. C. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy in the European Union*, Oxford University Press (Oxford, 2011), at 408.

The binding nature of the input is clear in some cases, like when a positive assessment of the application is a requirement for the other administration to proceed any further, but in some other cases it is not. The example of chemicals<sup>43</sup> is very eloquent because although the results of the assessment that specialised bodies of Member States must carry out are not mandatory for the Commission, the technical expertise required for such analyses entail that those results are not in practice put into question and thus are conclusive. Another example can be found in some mechanisms of information exchange where the applicable rules do not specify that data provided cannot be disregarded, but data as difficult to get as fingerprints used for national authorities dealing with asylum procedures<sup>44</sup>, cannot be challenged in practice, even though the rules do not specify its binding character.

Even though the delimitation might always not be straightforward, the distinction is relevant. As we will see in the next chapter the shared responsibility of two administrative procedures is the element that brings about a real change of paradigm. In case only one public administration takes responsibility for the entire administrative procedure, the problems that administrative cooperation may entail do not require the deep legal analysis and solutions that will be proposed in the next chapters.

Finally, an additional, perhaps less relevant criterion is whether composite procedures are open to the participation of other stakeholders or it remains closed to the interaction between national and European public authorities. The subject-matter of several composite procedures make it prone to receiving input from the representatives from the industry or groups of experts, like it is the case of the approval of pesticides and GMOs. However, this participation is generally consultative only. An example of a more far-reaching participation is ecolabels, where stockholders are even given the right to ask for the initiation of the revision of the award criteria<sup>45</sup>. Nevertheless, even if this

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<sup>43</sup> It will be examined in detail in section 4.4.6.

<sup>44</sup> See section 4.4.9.

<sup>45</sup> Article 7 of Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ 27 L 2010, 1-17) and more in detail, section 4.4.8.

case, and although they might have an important practical contribution to do, the legal relevance of their input is minor from a legal point of view.

#### ***4.3.- The origin and development of composite procedures***

Composite administrative procedures have been growing apart from the two-level system of indirect implementation of EU law so functional in Monnet's ideas<sup>46</sup> and still enshrined in the Treaties<sup>47</sup>, as we saw extensively in previous chapters. Due to both the imbalance of the EU objectives with regards to its capabilities<sup>48</sup>, and the increase in the ambitions of the Union and the reluctance of Members States to yield more formal powers, composite procedures have emerged, somehow informally in the beginning and later with specific procedures in certain Regulations, though still without any kind of legal systematisation.

The traditional logic of indirect implementation, according to which national public administrations' capabilities would only be necessary for the implementation of European policies has, in most fields, been substituted by the logic of cooperation between European and national public administrations. This is not only true for the implementation but also for the development and framing of those policies. Information gathering and processing, technical expertise and risk assessment capabilities, they all have proven essential for the administrative action of the EU. It is now evident that the national level of Administration needed to be brought into play for these tasks<sup>49</sup>. This phenomenon explains much of the proliferation of composite procedures.

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<sup>46</sup> Jean Monnet, *Mémoires*, Le livre de poche (Paris, 2007), at 558, and previously in section 2.2.1.

<sup>47</sup> Article 291(1) TFEU states that Member States shall adopt all measures of national law necessary to implement legally binding Union acts. Implementation at the central level is possible but exceptional, as result from Article 291(2) TFEU.

<sup>48</sup> Les Metcalfe, "Reforming the Commission", 38 (5) *Journal of Common Market Studies* (2000), 817-41, at 824 highlights that the lack of administrative resources to cope with its functions has led to a dependence by the Commission on the member States, not only in implementation, but on every phase of the policy-cycle.

<sup>49</sup> Paul Craig, "Shared Administration and Networks: Global and EU perspectives", in Gordon Anthony, Jean-Bernard Auby and John Morison (eds.), *Values In Global Administrative Law*, Hart Publishing (Oxford, 2011), 81-116. The author analyses examples where information networks and pooling of knowledge are particularly intense.



There is yet another factor for the involvement of national administrations in the European administrative action which shall not to be neglected. Acceptance by member States of the extension of European competences into more sensitive areas has often happened on the condition of more intervention by national authorities<sup>50</sup>. Indeed the surge of composite procedures can be a paramount example of the neo-functional logic in which certain developments create “needs” to which the system is required to respond, by setting in motion new procedures<sup>51</sup>.

The reasons behind the development and proliferation of composite procedures have also had other manifestations. This is particularly the case of comitology and European agencies. Both of them emerged from the practical needs of more EU action but with EU powers under control of Member States. Many of the particular arrangements for the allocation and control of European funds also respond to the same logic.

Comitology procedures, as we will see, are not composite procedures but follow a similar logic of cooperation and they are at times very tightly connected to composite procedures inasmuch as they are often one of the phases of the administrative sequences that constitute composite procedures. Similarly, agencies are not present in all composite procedures and not every procedure in which agencies participate are composite, but as we will examine later, in many of the composite procedures the intervention of agencies, both European and national, is relevant. Hence, these are phenomena with a certain degree of connexion to composite procedures and which provide the relevant context for the analysis of the specific examples of composite procedures.

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<sup>50</sup> See Hussein Kassim, “The European Administration: Between Europeanization and Domestication”, in Jack Hayward and Anand Menon (eds.), *Governing Europe*, Oxford University Press (Oxford, 2003), 139-61, at 148.

<sup>51</sup> The basic idea is once the EU level has been put in charge of functionally specific tasks, it will set in motion processes which generates pressures towards further integration. See, Jeppe Tranholm-Mikkelsen, “Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light on the New Dynamism of the EC”, 20 (1), *Millennium: Journal of International Studies* (1991), 1-21, at 4. This article analyzes how recent developments in European integration could be explained in the light of the neo-functional rationale. The proliferation of composite procedures can also somehow reflect those ideas. Also, on this line, Ben Rosamond, “The Uniting of Europe and the Foundations of EU Studies: Revisiting the Neofunctionalism of Ernst B. Haas”, 12(2) *Journal of European Public Policy* (2005), 237-254.

#### 4.3.1.-Comitology

Comitology procedures are not *per se* composite procedures. There is a necessary organic element of composite procedures that does not exist in comitology. That is, national authorities intervening in a European administrative procedure must do so in their capacity of national authorities, and not as members of a European body; that being said, there is a reason to explain comitology as part of the origin of composite procedures. The logic of cooperation with Member States in the implementation of EU law by European authorities was first apparent in comitology and then extended to composite procedure. As a matter of fact, it will be explained later that many of the examples of composite procedures bring about a comitology procedures as one, usually the last, phase of the overall procedure<sup>52</sup>.

The essential objective of composite procedures, that is, the joint implementation of EU law, originated first with the development of comitology procedures. Comitology refers to a set of procedures through which EU countries control how the European Commission implements EU law<sup>53</sup>. Before it can implement an EU legal act, the Commission must consult, for the detailed implementing measures it proposes, a committee where every EU Member State is represented. The committee provides an opinion on the proposed measures, which can be more or less binding on the Commission, depending on the particular procedure.

Comitology procedures were the result of a practical legal necessity; there was a need for a homogeneous administrative action at the EU level yet no provision could serve as a legal basis for the setting up of such procedures. The field where it emerged was the implementation of agricultural policy<sup>54</sup>.

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<sup>52</sup> See for example procedure for the authorisation of pesticides (Section 4.4.2), genetically modified organisms (Section 4.4.3), biocides (Section 4.4.5), and pharmaceuticals for human use (Section 4.4.4).

<sup>53</sup> Definition extracted from the webpage of the Comitology register, accessible at <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home>

<sup>54</sup> Carl Fredrik Bergström, *Comitology. Delegation of Powers in the European Union and the Committee System*, Oxford University Press, (Oxford, 2005), at 46.

Comitology was originally based on article 155(4) of the European Economic Community Treaty<sup>55</sup> which provided for an eventual delegation of implementing powers by the Council onto the Commission. Once the first of these procedures were set up<sup>56</sup>, they proved so practical that they quickly expanded to many policy areas of the former EEC<sup>57</sup>. As a counterbalance to the delegation of powers of the Commission, a committee composed of national representatives would be involved in the adoption of implementing measures. If this committee rejected the draft decision, the Commission had to refer the matter back to the Council<sup>58</sup>. Their role was primarily “supervising” the Commission<sup>59</sup>.

The consequence of the emergence of comitology procedures in the institutional balance and the powers allotted to the European level of decision making was twofold: firstly, it enabled an enormous expansion of the Commission administrative action, not foreseen by the Treaties; and secondly, it enabled the direct participation of Member States in that European administrative action, again not foreseen by the Treaties.

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<sup>55</sup> The provision in the original version of the Treaty of Rome stated: “In order to ensure the proper functioning and development of the common market, the Commission shall: ... exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.”

<sup>56</sup> Article 25 f) of Council Regulation 19/62/EEC of 4 April 1962, relating to the common organisation of the market in cereals, pork, eggs, poultry and fruit and vegetables (OJ 1962 30), is considered the provision that gives “birth” to comitology procedures. At that time the Council recognised that it lacked the resources to make all the necessary implementation rules in the first agricultural market regimes. There was strong national resistance to an unconditional delegation of powers to the Commission, so the compromise was found to set up implementation committees on an ad hoc basis when delegating executive duties to the Commission.

<sup>57</sup> There was a noteworthy increase of comitology procedures in the areas of agriculture, development aid, food safety and customs union. For further insights on the origins and development of the comitology procedures, see Renaud Dehousse, “Comitology: who watches the watchmen”, 10(5) *Journal of European Public Policy* (2003), 798–813; Christian Joerges, “Deliberative Political Processes Revisited: What we have learnt about Legitimacy of Supranational Decision-Making”, 44(4) *Journal of Common Market Studies*, (2006), 779–802; and Jen Blom-Hansen, “The origins of the EU comitology system: a case of informal agenda-setting by the Commission”, 15(2) *Journal of European Public Policy* (2008), 208–26.

<sup>58</sup> For a detailed description of the early functioning of the comitology committees and its development, see, Bergström *Comitology – Delegation of Powers ...*, at 38.

<sup>59</sup> Ellen Vos, “50 Years of European Integration, 45 Years of Comitology”, in Andrea Ott and Ellen Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives*, T.M.C. Asser Press (The Hague, 2009), 31–56, at 35.

Although the Court of Justice had confirmed that these procedures were not in breach of EC law<sup>60</sup>, an explicit legal base for comitology was later introduced by the Single European Act in article 202 of the EEC Treaty<sup>61</sup>, and codification followed by virtue of a general Comitology Decision, which systematized the scattered proceedings into three basic categories procedures<sup>62</sup>.

There were subsequent changes in the rules of the Comitology system to this date<sup>63</sup>, introducing, among other things, a more relevant role of the European Parliament. The Treaty of Lisbon has brought about a radical change in implementing powers at EU level through the splitting the legal basis into two: delegated acts and implementing acts<sup>64</sup>. The procedure for the adoption of implementing act is what

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<sup>60</sup> The Court of Justice emphasised that a delegation of powers to the Commission under Article 155 EEC was entirely optional, and that consequently Article 155 EEC did not preclude the Council from subjecting delegated powers to detailed rules for their exercise with the participation of a committee, Case 25/70 *Einfuhr- und Vorratstelle für Getreide und Futtermittel / Köster, Berodt & Co.*, [1970] ECR 1161; Case 23/75 *Rey-Soda / Cassa Conguaglio Zuccheri* [1975] ECR 1301; and Case 5/77 *Tedeschi / Denkavit Commerciale Srl.* [1977] ECR 1555.

<sup>61</sup> “The Council shall confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements ... [These] must be consonant with principles and rules to be laid down in advance by the Council. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself”.

<sup>62</sup> The so called first Comitology Decision was Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, (OJ 1987 L 197, 33).

<sup>63</sup> The first Comitology Decision was repealed by the new Council Decision 1999/468/EC of 28 June 1987, (OJ 1987 L 184, 23). This Decision was amended by Council Decision 2006/512/EC, of 17 July 2006 (OJ 2006 L 200, 11). Finally, consistent with the new rules in the Lisbon Treaty, all the former instruments have been replaced by Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ 2011 L 55/13.

<sup>64</sup> The relevant provisions are articles 290 and 291 TFEU. According to article 290:

“1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective ‘delegated’ shall be inserted in the title of delegated acts.

Article 291 provides:

remains of Comitology, now simpler and with eventually a narrower scope<sup>65</sup>. Indeed, no committees of experts from Member States will be participating in the procedures for the adoption of delegated acts, and hence these procedures can no longer be considered multi-level procedures.

Comitology was thus conceived as a practical arrangement to allow the Communities to extend their executive powers without Member States yielding unlimited powers to the Commission. The rationale behind comitology was to find a middle ground between far-reaching European Administration and a dysfunctional intergovernmental administration<sup>66</sup>. In such a way, comitology can be seen as the “embryo” of multi-level execution of EU law which has progressively expanded<sup>67</sup> and become more intense.

Indeed many academic writings provide practical evidence that the logic of supervision and control of the beginning has now been replaced by that of

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“1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

4. The word ‘implementing’ shall be inserted in the title of implementing acts.”

Prior to the Lisbon Treaty, that distinction whether an act of the Commission had a delegated or an implementing nature was not so clear-cut. The fact that there is two categories, however, does not imply that the distinction between the two of them shall not be controversial. There is abundant literature on the distinction between the two, for instance, Paul Craig, “Delegated Acts, Implementing Acts and the New Comitology Regulation” 36 *European Law Review*, (2011), 671-90; Steve Peers and Marios Costa, “Accountability for Delegated and Implementing Acts after the Treaty of Lisbon”, 18(3) *European Law Journal* (2012) 427-60; Alan Hadacre and Michael Kaeding, “The two new worlds of delegation of executive powers to the European Commission and its implications for European and national public administrations” 2011(1) *EIPASCOPE* (2011), at [http://www.eipa.eu/files/repository/eipascope/20110912105558\\_EipascopeSpecialIssue\\_Art5.pdf](http://www.eipa.eu/files/repository/eipascope/20110912105558_EipascopeSpecialIssue_Art5.pdf).

<sup>65</sup> Alan Hardacre and Michael Kaeding, “Delegated & Implementing Acts – The New Comitology”, EIPA Essential Guide, September 2011, at 15, at <http://publications.eipa.eu/en/details/&tid=1839>.

<sup>66</sup> Morten Egeberg, Günther F. Schäffer and Jarle Trondal, "EU committee governance. Between Intergovernmental and Union Administration", in Morten Egeberg, *Mutilevel Union Administration. The Transformation of executive politics in Europe*, Palgrave (Basingstoke, 2006), 66-85, at 67.

<sup>67</sup> The list of comitology committees which amounts to approximately 300 can be found in the Comitology Register online at <http://ec.europa.eu/transparency/regcomitology/index.cfm>.

cooperation<sup>68</sup>. The original idea that Comitology committees would just supervise and control the Commission's implementation powers no longer reflects the practice of EU law implementation. It is rather an institutionalised co-operative mechanism to uphold supranationalism<sup>69</sup>, which can be considered the gist of the composite procedures which we are examining. Nevertheless, comitology procedures have reached a certain maturity and enjoy a clear legal framework, unlike composite procedures.

#### 4.3.2. Agencies

There are many concomitances between the factors that explain the emergence and proliferation of European agencies and those that have given rise to composite administrative procedures.

Scholars usually describe the origin and evolution of European agencies as a series of waves<sup>70</sup>. It is not necessary to describe this evolution in detail or the specifics of each and every agency at this point. What is important for the purposes of the thesis is to underline that the emergence of agencies with an increasingly relevant role in the implementation of European policies is linked with the phenomenon of administrative cooperation between European and national actors<sup>71</sup>. As professors Curtin and Dehousse argue, the mushrooming of autonomous agencies is one of the most important structural developments of the past two decades in EU policy making<sup>72</sup>, and certainly

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<sup>68</sup> Academic research on the institutional negotiations on establishing comitology committees, the impact of the comitology voting procedures and the behaviour of the Commission in relation to the committees supports that view. See Vos, "50 Year of European...", at 48.

<sup>69</sup> Mario Savino, "The Role of Committees in the EU Institutional Balance: Deliberative or Procedural Supranationalism?", in Thomas Christiansen, Johanna Miriam Oettel and Beatrice Vaccari (eds.), *21<sup>st</sup> Century Comitology – Implementing Committees in the Enlarged European Union*, European Institute of Public Administration (Maastricht, 2009), 19-48, at 38.

<sup>70</sup> Daniel Kelemen and Giandomenico Majone, "Managing Europeanization: The European Agencies," in John Peterson and Michael Shackleton (eds.), *The Institutions of the European Union*, Oxford University Press (Oxford, 2012), 219-240, at 220. Normally, the first wave is identified with the creation of the two first agencies in the 1970's, endowed with limited, strictly operational capabilities; the second wave came in the 1990's with a large spectrum of agencies able to issue administrative acts that were binding for third parties; and the last wave came with the recent creation of regulatory agencies.

<sup>71</sup> Jesús Ángel Fuenteaja Pastor, *La Administración Europea. La ejecución europea del Derecho y las políticas de la Unión*, Aranzadi (Cizur Menor, 2007), at 310.

<sup>72</sup> Deidre Curtin and Renaud Dehousse, "European Union agencies: tipping the balance?", in Madalina Busuioc, Martijn Groenleer, and Jarle Trondal, *The agency phenomenon in the European Union*, Manchester University Press (Manchester, 2012), 193-205, at 193.

one that has a crucial impact in composite procedures, mostly characterised by the intervention of EU and, sometimes, national agencies. There are many reasons that are usually pinpointed as explaining the creation of agencies in the European Union<sup>73</sup>, such as the need to gather technical expertise<sup>74</sup>, the willingness to ensure autonomy from the Commission, the increase of administrative capacity, depolitisation, the convenience of decentralised bodies to facilitate coordination with national actors<sup>75</sup>, or even the increase of the level of compliance at the national level<sup>76</sup>. Indeed, the proliferation of agencies is part of a broader trend common to national political systems of Europe and other areas<sup>77</sup>.

In reality, considering the European context in particular, professor Chiti revealed that agencies appeared at the moment when the scheme of indirect administration became flawed and insufficient for the increasing objectives of the Communities but, at the same time, direct administration was deemed unacceptable to Member States<sup>78</sup>. These elements can be identified as the same causes for the birth of composite procedures. The establishment of agencies, interdependent to their national counterparts<sup>79</sup>, and where Member States could intervene and get a chance to shape the

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<sup>73</sup> Madalina Busuioc, *European Agencies. Law and Practices of Accountability*, Oxford University Press (Oxford, 2013), at 24. The rationale for agency creation is certainly different in each specific case, but, as this author argues, the main causes for this prolific phenomenon are common to all.

<sup>74</sup> Stefan Griller and Andreas Orator, "European University Institute, New Modes of Governance Project Policy Brief 22, Spring 2008, at 1, at [http://www.eu-newgov.org/database/PUBLIC/Policy\\_Briefs/NEWGOV\\_Policy\\_Brief\\_no22.pdf](http://www.eu-newgov.org/database/PUBLIC/Policy_Briefs/NEWGOV_Policy_Brief_no22.pdf).

<sup>75</sup> Berthold Rittberger and Arndt Wonka, "Introduction: agency governance in the European Union", in Berthold Rittberger and Arndt Wonka (eds.), *Agency governance in the European Union*, Routledge (London, 2012), 2-11, at 5.

<sup>76</sup> Esther Versluis, "Catalysts of compliance? The role of European Union agencies in the implementation of EU legislation in Poland and Bulgaria", in Madalina Busuioc, Martijn Groenleer, and Jarle Trondal, *The agency phenomenon in the European Union*, Manchester University Press (Manchester, 2012), 172-190, at 173.

<sup>77</sup> Fabrizio Gilardi, *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe*, Edward Elgar Publishing (Cheltenham, 2008), at 107.

<sup>78</sup> Edoardo Chiti, *Le Agenzie europee. Unità e decentramento nelle Amministrazioni comunitarie*, Cedam (Milan, 2002), at 57.

<sup>79</sup> Edoardo Chiti, "Les agences, l'administration indirecte et la coadministration", in Jean-Bernard Auby, Jacqueline Dutheil de la Rochère, *Traité de droit administratif européen*, Bruylant (Brussels, 2007), 267-82, at 275.

He argues that European agencies enabled the creation of a efficient network with other national agencies.



decision-making procedures at the agencies was considered acceptable to national governments and respectful to the distribution of powers laid down in the Treaties<sup>80</sup>.

Moreover, the procedural cooperation which is channelled through European agencies is thus considered respectful of the principle of subsidiarity, inasmuch as indirect administration is not possible but direct administration is deemed disproportionate<sup>81</sup>. This procedural cooperation will often take the form of composite administrative procedures.

European agencies allow for an expansion of the EU administrative action well accepted by member States as long as they can participate in it, similarly to the compromise found in comitology. In fact, national agencies are usually willing to surrender some autonomy to EU agencies, since they gain reciprocal powers of cross-border enforcement in other Member States<sup>82</sup>. From that perspective, they are not only a key element of the integrated administration that the EU has become, but the ideal framework for the emergence of composite procedures. As a Report presented to the Commission in 1999 on the role of specialised agencies in decentralising EU Governance<sup>83</sup> correctly points out:

“... [T]he new European agencies have not been designed to operate in isolation, or to replace national regulators. Rather, they are expected to become the central nodes of networks including national agencies as well as international organisations.”

Professor Dehousse argued that one of the evident problems of European integration was, and still is, to ensure the uniform application of EU regulations at the

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<sup>80</sup> Karl-Heinz, "The New European Agencies. The European Environment Agency and Prospects for a European Network of Environmental Administrations", Report 50 *Robert Schuman Centre EUI* (1996), at 3.

<sup>81</sup> Yannis V. Avgerinos, "EU Financial Market Supervision Revisited: The European Securities Regulator", Jean Monnet Working Paper 7/03 (2003), at 14.

<sup>82</sup> Paul Craig, "Shared Administration and Networks: Global and EU Perspectives", in Gordon Anthony, Jean-Bernard Auby, John Morison and Tom Zwart (eds.), *Values in Global Administrative Law*, Hart Publishing (Oxford, 2010), 81-116, at 97.

<sup>83</sup> Michelle Everson, Giandomenico Majone, Les Metcalfe, Adriaan Schout, "The Role of Specialised Agencies in Decentralising EU Governance", Report Presented to the Commission, 1999, at 85, at [http://ec.europa.eu/governance/areas/group6/contribution\\_en.pdf](http://ec.europa.eu/governance/areas/group6/contribution_en.pdf).



national level<sup>84</sup>. Direct execution had to be restricted to certain, very specific policy areas, if procedural autonomy of Member States was to be maintained. Thus, the only solution that could be envisaged was the creation of agencies playing the central role on pan-European regulatory networks with intense procedural cooperation<sup>85</sup>. We will see later how agencies take a relevant part in the clearest examples of composite procedures<sup>86</sup>.

Many scholars have highlighted that agencies are an evolution from previous forms of administrative co-operation in the European system, being different from them basically in their completeness and institutional stability<sup>87</sup>. This evolution has led to a new legal model of joint exercise of supranational functions which can be defined as decentralised integration<sup>88</sup>, in which agencies are part of "common systems" where national and European bodies participate<sup>89</sup>.

In certain areas, agencies represent an evolution from comitology committees and, to a certain extent, follow the same rationale, that is, the need to increase the areas of European administrative action while keeping Member States involved in the process. Agencies entail more institutionalised mechanisms and further guarantee of independence and technical expertise<sup>90</sup>. An example that illustrates that is the European Medicines Agency which substituted several comitology committees on the field<sup>91</sup>.

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<sup>84</sup> Renaud Dehousse, "Regulation by networks in the European Community: the role of European Agencies", 4(2) *Journal of European Public Policy* (1997), 246-61, at 254.

<sup>85</sup> Dehousse, "Regulation by networks...", at 255.

<sup>86</sup> See sections 4.4.2., 4.4.3, 4.4.4 among others.

<sup>87</sup> Dehousse, "Regulation by Network ...", at 246; and Les Metcalfe, "Etablissement de liens entre les différents niveaux de gouvernance : intégration européenne et mondialisation, 66(1) *Revue Internationale des Sciences Administratives* (2000) 139-168, at 139; Alexander Kreher, "Agencies in the European Community – A Step Towards Administrative Integration in Europe", 4(2) *Journal of European Public Policy* (1997), 225-245, at 225.

<sup>88</sup> Edoardo Chiti, "On European Agencies", in Erik O. Eriksen, Christian Joerges and Jiirgen Neyer (eds.), *European Governance, Deliberation and the Quest for Democratisation*, ARENA (Oslo, 2003), 275-326, at 324.

<sup>89</sup> Sabino Cassese, "Il procedimento amministrativo europeo", in Francesca Bignami and Sabino Cassese, *Il procedimento amministrativo nel diritto amministrativo europeo - Rivista Trimestrale di diritto pubblico* (2004), 31-53, at 32.

<sup>90</sup> Ellen Vos, "Reforming the European Commission: What Role to Play for EU Agencies", 37(5) *Common market Law Review* (2000), 1113-34, at 1116.

<sup>91</sup> See Hofmann, Rowe and Türk, *Administrative Law and Policy* ..., at 922, and, with the same example, Kelemen and Giandomenico Majone, "Managing Europeanization...", at 231.

Although there is frequently a connexion between agencies and composite procedures, this connexion cannot be generalised. When it comes to European agencies no general legal approach to their decision-making procedures can be made. Their procedural arrangements are determined on a case by case basis and there is a lack of common framework to all of them<sup>92</sup>, so not every single one of the decision-making procedures in the European agencies involves actors from different levels of administration. Moreover, even when they involve those multiple actors, this does not necessarily entail that the cooperation takes a procedural form. Many of the functions of agencies are restricted to sharing of information and best practices. Functions of such nature do not entail composite procedures, or administrative procedures for that matter, inasmuch as they are not aimed at making individual decisions.

The rationale behind agencies and composite procedures is thus the same; the practical need for mechanisms of intense cooperation<sup>93</sup> between national and European authorities aimed at the execution of EU law. A very relevant feature that is also common to both of them is fragmentation and non-existence of barely any legal systematisation<sup>94</sup>. Finally, agencies and composite procedures both bring about the legal challenge of their accountability<sup>95</sup>. Thus, although the phenomena are different, they have similar causes at origin and often the examples of composite procedures entail the intervention of European agencies.

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<sup>92</sup> Many scholars complain that the system of agencies is ambiguous and confusing due to this lack of common framework which results in a heterogeneous situations concerning the European agencies' functions, decision-making powers and structures. *See* for instance Sami Andoura and Peter Timmerman, "Governance of the EU: The Reform Debate on European Agencies Reignited", European Policy Institute Network, Working Paper No. 19, October 2008, at 1, at <http://www.ceps.eu/files/book/1736.pdf>.

<sup>93</sup> An idea of the intensity in cooperation that is present in some regulatory agencies (and in composite procedures) can be illustrated by Article 22 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, 1–24), which reads:

" 8. *The Authority, Commission and Member States shall cooperate to promote the effective coherence between risk assessment, risk management and risk communication functions.*

9. *The Member States shall cooperate with the Authority to ensure the accomplishment of its mission.*"

<sup>94</sup> In the case of agencies, however, there exists a general legal framework for executive agencies; Council Regulation (EC) No 58/2003 of 19 December 2002, laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (OJ 11 L 2003, 1–8).

<sup>95</sup> For agencies, *see* for more detail Busuioc, *European Agencies...*

#### 4.3.3.- Joint execution of EU budget, shared management of European funds.

From the very beginning, most of the important policies of the European Communities were implemented through schemes of joint management of funds. The majority of the European budget consisted, and still consists, of funds that are managed jointly by the Commission and the competent national authorities, and it traditionally consists from its most part in the financing of the Common Agricultural Policy and the Structural Funds, although it has recently been extended to other areas like Development Cooperation<sup>96</sup>.

Thus, the initial policy areas that were central to the action of the European Communities involved the awarding of subsidies, compensatory measures, and other forms of aid<sup>97</sup>. The two largest areas of EU spending have traditionally been the Common Agricultural Policy and Structural Funds<sup>98</sup>. The current trend is that the relative weight of these areas in the common budget is reduced, but agricultural, regional and other development funds constituted the by far largest share of the budget of the European Communities during the first decades of its existence<sup>99</sup>. The Treaties called on the establishment of a common organisation of agricultural markets, for which the set-up of agricultural funds were necessary. The Commission needed to transfer those funds from its budget to the individual beneficiaries.

National authorities were logically called to intervene in the allocation, the actual transfer, the control, and the eventual recovery of the funds. The schemes to that end could take the form of indirect administration, with a national administration granting the funds to the beneficiary, but some other mechanisms were also set up. The implementation of the vast Common Agricultural Policy required delegation of

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<sup>96</sup> Fuanteaja, *La Administración Europea...* at 446.

<sup>97</sup> Neill Nugent, *The Government and Politics of the European Union*, Palgrave (Basingstoke, 2006), at 456.

<sup>98</sup> Andrew Moravcsik, "Reassessing Legitimacy in the European Union", 40(4) *Journal of Common Market Studies* (2002), 603-24, at 608.

<sup>99</sup> The share of agricultural policy in the European budget reached its peak in 1973, at 80 %, and has been steadily declining ever since. See for more details Peter Robson, *The Economics of International Integration*, Routledge (New York, 1998), at 148. Today, it amounts to just over 40 %; source DG Agriculture website, [http://ec.europa.eu/agriculture/cap-post-2013/graphs/graph1\\_en.pdf](http://ec.europa.eu/agriculture/cap-post-2013/graphs/graph1_en.pdf)

executive competences -a phenomenon which is at the origin of comitology, as previously explained- as well as joint execution mechanisms with shared powers between the Commission and Member States. In such a way, the arrangements needed for the implementation of the Common Agricultural Policy shifted the balance of competences between the Commission and the Council and, more importantly, between the Commission and Member States<sup>100</sup>.

Considerable funds were necessary to carry out the Common Agricultural Policy, and they were put in place with the first European Agricultural Guarantee Fund (EAGF) in 1962<sup>101</sup>. Member States agreed that the financing of these large funds will be attributed to the Community, but not entirely its execution<sup>102</sup>. However, the Member States would not hold the monopoly of execution either and they would either receive very detailed rules that would restrain their margin of appreciation or participate in mechanisms of cooperation, whose features resembled sometimes composite procedures, in form of a sequence of administrative steps with responsibilities allocated subsequently to the Commission and to the national administrations.

A similar rationale lies behind the establishment of the other structural funds<sup>103</sup>. Structural funds are financial instruments designed to assist the Commission and the Member States in setting up, implementing and financing the structural policy of the Union<sup>104</sup>, the most important of which are the Regional Development Fund, which aims to strengthen economic and social cohesion by correcting imbalances between the

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<sup>100</sup> Jesús Ángel Fuenteaja Pastor, "Las competencias ejecutivas de la Administración Europea en el ámbito de la Política Agraria Común", 26 *Revista de Derecho de la Unión Europea* (2014), 41-76, at 42.

<sup>101</sup> Council Regulation 25/62/EEC, of 4 April 1962 (OJ 1962 L 30, 11).

<sup>102</sup> Fuenteaja Pastor, "Las competencias ejecutivas...", at 43.

<sup>103</sup> According to Article 174 TFEU and following structural funds aim at the adjustment policy among the different Member States, and include, together with the Guidance Section of the European Agricultural Guidance and Guarantee Fund, the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the Financial Instrument for Fisheries Guidance, all included in the general provisions of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, 320–469). The same aims apply to the European Investment Funds of the European Investment Bank, but the legal regime is different.

<sup>104</sup> Bettina Schöndorf-Haubold, "Common European Administration: the European Structural Funds", in Oswald Jansen and Bettina Schöndorf-Haubold, *The European Composite Administration*, Intersentia (Cambridge, 2011), 25-54, at 26.

European regions, and the European Social Fund, an instrument for the promotion of fairer job opportunities.

The schemes for the distribution of the subsidies often also entailed cooperation between national and European administrative actors, in such a way that these funds are cited as example of policy networks and multilevel administration<sup>105</sup>. The management of these funds is thus shared<sup>106</sup>. The cooperation is so intertwined that German authors name 'grant administration' (*Leistungverwaltung*) the whole of the national and European bodies in charge of the allocation of budgetary commitments for structural funds<sup>107</sup>.

The specific mechanism through which these subsidies were transferred are different for each instrument and have changed through time. Moreover, the principle of procedural and organisational autonomy of Member States is generally respected, so rules vary according to each national system, although there is certainly an influx of the European rules<sup>108</sup>.

The system is thus very complex and difficult to analyse systematically from a legal point of view, but what is important to retain for our purposes is that the execution of the policies does not only involve national authorities. The implementation, meaning the award and control of individual subsidies, is mostly carried out jointly by European and national authorities, like the *Borelli* case which will be examined in detail later exemplifies. Mechanisms of cooperation, such as a grant being requested to a national authority, which will deal with the file and forward a reasoned opinion to the Commission which, on the basis of such opinion, decides to award the subsidy can be

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<sup>105</sup> See further in Hubert Heinelt and Randall Smith, *Policy Networks and European Structural Funds*, Aldershot (Avebury, 1996), at 11.

<sup>106</sup> Paul Craig, *EU Administrative Law...*, at 96. He cites a report by a Committee of Independent Experts with an eloquent definition of the kind of management that relates to structural funds. "Management of those Community programmes where the Commission and the Member States have distinct administrative tasks which are inter-dependent and set down in legislation and where both the Commission and the national administrations need to discharge their respective tasks for the Community policy to be implemented successfully." See also, in more detail in Paul Craig, "Shared administration, Disbursement of Community Funds and the Regulatory State, in Herwig C. H. Hofmann and Alexander H. Türk (eds.), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, Edward Elgar Publishing (Cheltenham, 2009), 348-59.

<sup>107</sup> Thomas Oppermann, *Europarecht - Ein Studienbuch*, C. H. Beck (Munich, 1999), at section 968.

<sup>108</sup> Schöndorf-Haubold, "Common European Administration...", at 32.

qualified as composite procedures<sup>109</sup>. Similarly, the schemes for the award of the European Social Funds are also composite procedures that have risen many questions on the procedural rights of individuals<sup>110</sup>.

Here again, the different mechanisms of joint execution of the EU budget have also contributed to the proliferation of composite procedures. The administrative model, which has evolved through time, of a cooperative, tiered allocation of subventions does not fit into the conventional categories of direct and indirect implementation, but rather a common administrative set up of procedures which involves both national and Union bodies<sup>111</sup>. Today, the essential elements of shared implementation of the EU budget are laid down in the Financial Regulation, which contains a specific category of shared management, as different from both direct management and indirect management<sup>112</sup>. These joint activities concern not only the very allocation of the funds, but also the planning, implementation and monitoring of the funds<sup>113</sup>. The pragmatic procedural approach of the implementation of those European funds and, in general, of the shared management of the EU budget in some sectors, can also be considered at the origin of composite procedures.

#### ***4.4.-Composite procedures in EU law: Analysis and some examples***

##### *4.4.1.- The logic of cooperation in the implementation of EU law and policy*

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<sup>109</sup> The example is taken from Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ 1977 L 51, 1–6), which is examined later in section 4.4.7.

<sup>110</sup> See section 5.2.2.

<sup>111</sup> Schöndorf-Haubold, "Common European Administration...", at 32.

<sup>112</sup> Article 59 of Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L298, 1-96):

"Where the Commission implements the budget under shared management, implementation tasks shall be delegated to Member States. The Commission and the Member States shall respect the principles of sound financial management, transparency and non-discrimination and shall ensure the visibility of Union action when they manage Union funds. To this end, the Commission and the Member States shall fulfil their respective control and audit obligations and assume the resulting responsibilities laid down in this Regulation. Complementary provisions shall be laid down in sector-specific rules."

<sup>113</sup> Holger Holzwardt, *Der rechtliche Rahmen für die Verwaltung und Finanzierung der gemeinschaftlichen Strukturfonds am Beispiel des EFRE*, Duncker und Humblot (Berlin, 2003), at 289.

Cooperation between national and European administrations has become the key element in the implementation of EU law and policies. Indirect administration having become insufficient, schemes that stress cooperation rather than separate distribution of competences are becoming more and more common<sup>114</sup>. This trend is not exclusive of areas where indirect administration was formerly the rule but also in the inverse situation. One example is the field of competition law, traditionally an example of direct administration by the Commission. Since Regulation 1/2003<sup>115</sup>, new provisions facilitate cooperation between national competition authorities and the Commission. There are also areas where the co-operation is rather facilitated among national authorities of Member States, who keep the exclusive competences of implementation, like in happens in the field of consumer protection<sup>116</sup>. Composite procedures are only one manifestation of the cooperative nature of the relationships between the administration of the Union and that of Member States. Composite procedures constitute a phenomenon that is becoming increasingly common in various policy areas<sup>117</sup>.

Professor Craig explains that these composite procedures are growing particularly in the different sectors of Internal Market law because of the Commission's move towards a strategy<sup>118</sup> based in product standardization<sup>119</sup>, rather in the technique of mutual recognition following the old *Cassis de Dijon* ruling<sup>120</sup> of the past. In this sense, many of the newest Internal Market regulations on product authorisation establish and lay provisions for composite procedures.

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<sup>114</sup> Andreas Føllesdal, Ramses Wessel and Jan Wouters, *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes*, Martinus Nijhoff Publishers, (Leiden, 2008), at 3.

<sup>115</sup> Council Regulation (EC) 1/2003 of 16 December 2002, on the implementation of the rules on competition, OJ 2003 L 1, 1. In particular, articles 11, 12 and 16.

<sup>116</sup> Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ 2004 L364/1. For more details, see Craig, "Shared Administration and Networks...", at 95.

<sup>117</sup> Hofmann, "Composite decision making procedures...", 138-139.

<sup>118</sup> This move is best represented in the Commission's White Paper COM (85) 310 on completing the Internal Market, paragraph 64, available at [http://europa.eu/documents/comm/white\\_papers/pdf/com1985\\_0310\\_f\\_en.pdf](http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf).

<sup>119</sup> Craig, "Shared Administration and Networks...", at 101.

<sup>120</sup> Case 120/78, *Rewe-Zentral AG / Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon') judgment of 20 February 1979, [1979] ECR 649.



At the moment, even the Area of Freedom, Justice and Security, so characterised by inter State cooperation, is becoming increasingly prone to composite procedures as well, although in this subject-matter the intervention of European agencies or other bodies is still relatively modest. The procedures of exchange of information and intense cooperation of the Schengen area is one example<sup>121</sup>, asylum procedures is another<sup>122</sup>. Police and judicial co-operation in criminal matters also include many composite procedures<sup>123</sup>.

Composite procedures have existed for several decades, in particular in the field of agricultural policies, where those procedures can be identified back to the first mechanisms of the Common Agricultural Policy in early years of the decade of 1960. The proliferation of composite procedures began in the last decade and they cover many of the new procedures being established for the approval of products in relationship with the functioning of the internal market. It is in this field that most composite procedures are found, and where the examples are more illuminating. The area of freedom, security and justice, with increasing competences awarded at the Union level of decision-making will be another field with an increasing number of composite procedures.

In this section the main examples of composite procedures will be analysed. Some procedures that fall short to qualify as composite procedures *stricto sensu*, *i. e.* when the intervention of either level of public administration is not binding, shall also be explained because they are borderline cases which can be useful to draw a clear limit of what are composite procedures from a strict point of view for the purposes of the dissertation. They also raise some of the concerns that will be subsequently explained.

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<sup>121</sup> Regulation No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ 2006 L 105, 1–32, especially articles 14-17; and Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 L 349, 1.

<sup>122</sup> Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, OJ 2000 L 316, 1-10.

<sup>123</sup> Council Decision 2009/371/JHA of 6 April 2009, establishing the European Police Office, OJ 2009 L 121, 37; Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, OJ 2000 L 271, 4; and Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 2002 L 63, 1.



In any case, it is worth noting that some areas have experienced an evolution from national procedures with limited intervention from Union's authorities to a transformation into composite procedures<sup>124</sup> or, more intensely, into purely EU procedures with significant reliance on the expertise of Member States<sup>125</sup>.

Examples of composite procedures are explained in the following sections. They cover the areas of EU law where composite procedures are relevant, but not all composite procedures are analysed. Many concrete procedures for the granting of agricultural and structural funds, for example, are not explained as the dissertation would otherwise be lost in details. The procedures that most clearly exemplify composite procedures, where the characteristics that were described in the previous sections appear in a more noticeable way, are explained first. In the last sections, borderline procedures, where its composite nature according to the criteria used in this thesis can be debated, are analysed.

#### *4.4.2.- Active substances and plant protection products (Pesticides)*

The marketing of pesticides has not been subject to a common EU authorisation until very recently. Directive 91/414/EC<sup>126</sup> harmonised national legal regimes by introducing common authorisation criteria and giving the Commission, assisted by the European Food Safety Authority (hereinafter EFSA), a right to review national decisions. The regime followed a certain composite rationale<sup>127</sup>, that can be described as procedures with common authorisation criteria in a multilevel setting<sup>128</sup> and used

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<sup>124</sup> In the area of pharmaceuticals for human use there has been a progressive incorporation of more and more types of medicines to composite procedures. In the past some of those procedures were purely national although at times the rules and criteria for approval were harmonised at by European pieces of legislation.

<sup>125</sup> This is particularly true for the area of chemicals, that shall be examined later. There is relevant cooperation between the EU and national authorities, but from a strict point of view, these procedures have become essentially EU procedures.

<sup>126</sup> Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, 1–32).

<sup>127</sup> Andrea Keessen, "Reducing the Judicial Deficit in Multilevel Environmental Regulation: The Example of Plant Protection Products", in Oswald Jansen and Bettina Schöndorf-Haubold (eds.), *The European Composite Administration*, Intersentia (Antwerpen, 2011), 133-154, at 135.

<sup>128</sup> Keessen, "Reducing the Judicial Deficit...", at 137.

unified environmental principles<sup>129</sup>, but the administrative procedures remained purely national. However, a more consistent, centralised procedure was considered necessary<sup>130</sup> with enhanced powers for the Union's decision making authorities, while Member States would keep an important role, and therefore a new Regulation was passed.

Regulation 1107/2009<sup>131</sup> providing for a procedure for the placing of plant protection products in the market constitutes a very illuminating example of composite procedures. Not only it reflects all the essential features of composite procedures, but it explicitly addresses the need to combine the different levels of protection in the Member States, as well as their different weather and climatic conditions, with the Internal Market and the pertinence of harmonised criteria with view of authorising those products<sup>132</sup>. Indeed, in the case of plant protection products, there is an additional obstacle to a full harmonisation. The burden consists on the fact that environmental and climatic conditions are different and can thus result in different products authorised in the different areas, but the Regulation contains specific provisions in this vein<sup>133</sup>.

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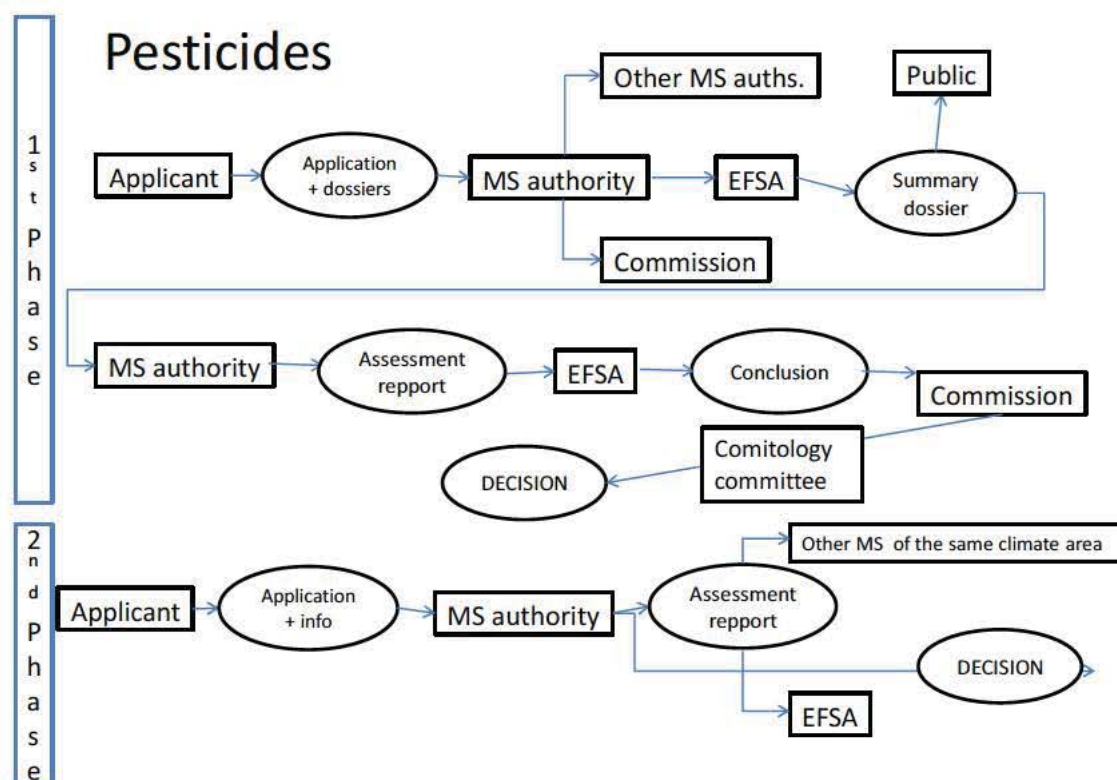
<sup>129</sup> Elisabeth Vogelesang-Stoute, "The authorisation of pesticides in the light of sustainability", in Frank Den Hond, Peter Groenewegen, Nico van Straalen (eds.), *Pesticides: Problems, Improvements, Alternatives*, Blackwell Publishers (Oxford, 2003), 31-52, at 41.

<sup>130</sup> Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme (OJ 200 L 242, 1-15).

<sup>131</sup> Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, 1-47).

<sup>132</sup> *Ibid.* at recital 9 and 10.

<sup>133</sup> *Ibid.* at recital 29, article 3(17) and Annex I.



Cooperation exists at various stages of the procedure, and it is not limited to one Member State and the EU authorities. Other Member States and even the general public may participate with their input too. The Regulation provides for two different procedures, one for the authorisation of active substances, safeners, synergists and co-formulants<sup>134</sup>; and one for plant protection products<sup>135</sup>. The first is a pre-requisite for the latter, so it might be deemed as a single procedure producing two authorisations; one for active substances, and one for plant protection products. This scheme, that brings additional complexity to our analysis, had been referred to by legal doctrine as a dual authorisation system<sup>136</sup>.

<sup>134</sup> Chapter II, articles 4-27.

<sup>135</sup> Chapter III, articles 28-57.

<sup>136</sup> Jan H. Jans and Hans H. B. Vedder, *European Environmental Law*, Europa Law Publishing (Groningen, 2008), at 402, citing Elizabeth Vogelesang-Stoute, "European Community Legislation on the Marketing and Use of Pesticides", 2 *Review of European Community & International Environmental Law* (1999), 144-151, at 145. The previous system, although granting a weaker role to the EU authorities, contained a similar two steps approval scheme. See Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, 1-32).

There is an additional procedure foreseen for the authorisation of adjuvants, to be set up in a Regulation to be adopted in accordance with the regulatory procedure with scrutiny<sup>137</sup>, but it has so far not been adopted. As regards the procedure for the authorisation of active substances, it starts with the submission of the application of the interested party<sup>138</sup>, with an attached summary dossier and a complete dossier<sup>139</sup>. The producer of an active substance shall forward its application to a Member State. It might be submitted to several Member States at a time, in which case a co-rapporteur system is foreseen<sup>140</sup>.

At the early stage of the procedure, there is an initial assessment on the admissibility of the application, based on a checklist for the dossiers submitted<sup>141</sup>. Once the application is deemed admissible, cooperation begins and the dossiers shall be forwarded to the other Member States, to the Commission, and to the EFSA<sup>142</sup>. The

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<sup>137</sup> Article 58, today it would be an examination procedure, in accordance with the new comitology Regulation 182/2011.

<sup>138</sup> Article 7(1).

<sup>139</sup> Article 8.

<sup>140</sup> Article 7(2)

<sup>141</sup> Article 9(1). This check only aims at a formal assessment on whether the dossier submitted are complete.

<sup>142</sup> This agency was established by Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, 1–24). Its mission and competencies are laid down in article 22 as follows:

"1. A European Food Safety Authority, hereinafter referred to as the "Authority", is hereby established.  
2. The Authority shall provide scientific advice and scientific and technical support for the Community's legislation and policies in all fields which have a direct or indirect impact on food and feed safety. It shall provide independent information on all matters within these fields and communicate on risks.  
3. The Authority shall contribute to a high level of protection of human life and health, and in this respect take account of animal health and welfare, plant health and the environment, in the context of the operation of the internal market.  
4. The Authority shall collect and analyse data to allow the characterisation and monitoring of risks which have a direct or indirect impact on food and feed safety.

...

7. The Authority shall carry out its tasks in conditions which enable it to serve as a point of reference by virtue of its independence, the scientific and technical quality of the opinions it issues and the information it disseminates, the transparency of its procedures and methods of operation, and its diligence in performing the tasks assigned to it.

It shall act in close cooperation with the competent bodies in the Member States carrying out similar tasks to these of the Authority.

8. The Authority, Commission and Member States shall cooperate to promote the effective coherence between risk assessment, risk management and risk communication functions.

9. The Member States shall cooperate with the Authority to ensure the accomplishment of its mission."

EFSA shall make the summary dossier available to the public<sup>143</sup>, hereby involving other stakeholders and civil society. From this moment, the rapporteur Member State shall draw up a draft assessment report<sup>144</sup> within twelve months of the notification of admissibility. This report shall evaluate whether the active substance meet the criteria for approval provided for in the Regulation<sup>145</sup> and whether maximum residue levels shall be included<sup>146</sup>.

Later on, EFSA takes charge of the file and circulates the draft assessment report to the applicant and the other Member States and makes it available to the public<sup>147</sup>. Additionally, it can organise a consultation of experts<sup>148</sup> or ask the Commission to consult a reference laboratory<sup>149</sup>. After one hundred and twenty days of the end of the period for the submission of written comments, the EFSA shall adopt a conclusion.

Subsequently, the Commission shall present a review report and a draft regulation to the standing committee on the food chain and animal health<sup>150</sup>. This committee is composed of representatives of the Member States and chaired by the representative of the Commission<sup>151</sup>. The Regulation refers to a regulatory procedure<sup>152</sup>. Under the new comitology rules<sup>153</sup>, it is the examination procedure that shall apply.

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<sup>143</sup> Article 10. However, confidential information in accordance with article 63.

<sup>144</sup> Article 11(1).

<sup>145</sup> Article 4.

<sup>146</sup> Article 11(2)

<sup>147</sup> Article 12(1).

<sup>148</sup> Article 12(2).

<sup>149</sup> Article 12(3), in this case, designation proceeds according to Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, 1–141).

<sup>150</sup> Article 13(1).

<sup>151</sup> Article 79(1), which refers to article 58 of Regulation (EC) No 178/2002.

<sup>152</sup> Article 79(3), which refers to Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC) (OJ 1999 L 184, 23-26), that is, a comitology procedure.

<sup>153</sup> Regulation (EU) No 182/2011. As explained in section 4.3.1, comitology procedures have been reduced to two; examination and advisory procedure. In accordance with article 13, examination procedure shall substitute regulatory procedure. This means that, by virtue of articles 5 and 6, that the Commission may only adopt an implementing act if the committee delivers a positive opinion. If a negative opinion is delivered, the Commission may either propose an amended version of the draft act

Through this mechanism, a Regulation shall be adopted with the approval of the active substance; subject to conditions, where applicable; or the rejection thereof<sup>154</sup>. In case of approval, it shall be included in the list of approved active substances electronically available to the public<sup>155</sup>. This approval can later be renewed, through an application submitted to a Member State<sup>156</sup> and following a procedure involving other Member States, the Commission and the EFSA with the same pattern as the one just examined<sup>157</sup>.

There is also a possibility for the Commission to review the approval at any time. This constitutes a different composite procedure in which the Commission enjoys a still more predominant role. It might start the procedure *ex officio* or at the request of a Member States<sup>158</sup>. In any case, it shall gather the opinions of the Member States and the EFSA<sup>159</sup> and, in the light of the new scientific and technical knowledge indicates that the substance no longer satisfies the criteria provided for in the Regulation, it shall issue a new Regulation withdrawing or amending the approval, again by means of a comitology procedure<sup>160</sup>.

The second procedure established in Regulation 1107/2009, leads to the approval of plant protection products. It differs significantly in terms of the sequence and the powers conferred to the different actors. As this products result from a combination of different authorised active substances, safeners and synergists<sup>161</sup>, this procedure is posterior to the one we have examined, and it is also less requiring.

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within two months, or refer the matter to the appeal committee. If the appeal committee is called upon, its opinion must be positive if the draft act is to be adopted.

<sup>154</sup> Article 13(2).

<sup>155</sup> Article 13(4)

<sup>156</sup> Article 15.

<sup>157</sup> Article 20.

<sup>158</sup> Article 21(1).

<sup>159</sup> Article 21(2).

<sup>160</sup> Article 21(3).

<sup>161</sup> If they contain only one or more active substance, they do not require approval, according to article 28(2).



The applicant shall submit an application in each Member State where he wishes to place a plant production product in the market<sup>162</sup>. Like in the previous procedure, the applicant must provide a number of documents and pieces of information<sup>163</sup>. The application shall be examined by the Member States proposed by the applicant, unless another Member State in the same zone agrees to examine it. In any case, the other Member States can be called to cooperate<sup>164</sup>.

The Member State examining the application shall make assessment in the light of current scientific and technical knowledge using guidance documents available at the time of application. It shall give all Member States in the same zone the opportunity to submit comments to be considered in the assessment<sup>165</sup>. For that, it shall apply the uniform principles of evaluation laid down in the Regulation<sup>166</sup>, and conclude with an assessment report<sup>167</sup>. The conclusions of this assessment report shall be used not only by the examining Member States, but also by all the other Member States to decide whether or not to grant authorisation for those products in the respective market<sup>168</sup>.

In order to strengthen the cooperation among Member States, a system of exchange of information is set up<sup>169</sup>. Moreover, the holder of an authorisation granted by one Member State may apply in another Member States through a simplified procedure of mutual recognition<sup>170</sup>. Nevertheless, this recognition is not automatic and Member States may decide not to grant the authorisation<sup>171</sup>. In a similar way as the

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<sup>162</sup> Article 33(1).

<sup>163</sup> Article 33(2) and 33(3).

<sup>164</sup> Article 35.

<sup>165</sup> Article 36(1).

<sup>166</sup> Article 29(6).

<sup>167</sup> This report shall be drawn up in accordance with the format established through an advisory procedure, by virtue of article 79(2).

<sup>168</sup> Article 36(2). In case other Member State refuse to grant authorisation in spite of the assessment reports being favourable, it shall inform the Commission and provide a technical and scientific justification, according to article 36(3).

<sup>169</sup> Article 39.

<sup>170</sup> Article 40.

<sup>171</sup> Article 42.

powers of the Commission concerning active substances, Member States can renew, withdraw or amend the authorisations granted in accordance with this procedure<sup>172</sup>.

Even though it might appear that in this second procedure, the input from the EU bodies is relatively limited<sup>173</sup>, considering that plant protection products need to contain active substances, safeners and synergists previously approved by the Commission it can be deemed as a composite procedure *stricto sensu* as a whole. In any case, whether considered one or two separate procedures, the global scheme laid down in Regulation 1107/2009 constitutes a powerful example of the level of procedural cooperation that some areas of EU administrative law has reached, not only between EU and national authorities, but also among Member States.

Overall, the procedure involves several actors and stakeholders, with a principal role played by national authorities, but where the most important analysis is carried out by the EFSA, an agency where Member States participate too. During the first phase of the procedure, the input of Member States is relevant inasmuch as their assessment report is necessary for the Commission to take a decision. Thus, the Commission makes the final decision as regards active substances, but with relevant participation from the Member States again through a comitology committee. Furthermore, the procedure ensures the participation of the relevant stakeholders, the general public and technical experts. On a second phase, it is Member States that take the final decision on the plant protection product, but it shall be based on the decision previously adopted by the Commission on the active substances.

The scheme entails a very entrenched balance of powers, the Commission and the EFTA on the one hand, and the national authorities, recipients of all applications, sole decision makers as regards plant protection products, and participant in the Commission's Regulation through a comitology committee, on the other. A jurist could soon envisage many eventual legal shortcomings in this complex scheme, beginning with a possibly controversial access to justice in case of a procedural breach without a

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<sup>172</sup> Articles 43 to 45

<sup>173</sup> It is restricted to the duty to inform the Commission in case of a denial of authorisation contrary to the conclusions of the assessment report drafted by the examining Member State, in accordance with article 36(3).



direct link to the final decision<sup>174</sup>. The complexity of the procedure makes it a likely field for criticism in terms of judicial deficit<sup>175</sup>.

#### 4.4.3.- *Genetically modified organisms*

Although the marketing and deliberate release of genetically modified organisms (hereinafter GMO) was only covered by a general regulatory framework in the EC since 1990<sup>176</sup>, it has attracted a significant legal, technical, and media attention since then.

The current legal framework results from long negotiations to strike a delicate balance between the precautionary principle and economic development which is not always evident<sup>177</sup>. Although the European Union has enacted one of the most stringent GMO regulations in the world<sup>178</sup>, there is a perception of at least part of public opinion that the approval of these organisms should be still more limited<sup>179</sup>. Procedural provisions on how these organisms are authorised largely reflect the policy and politics on the issue<sup>180</sup>. The legislators made a self-conscious effort to share authority and avoid

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<sup>174</sup> In the case of the decision by the Commission it would be easy to argue that the Court of Justice would be the competent judicial authority. In the case of a decision by a Member State, national courts would likewise be responsible.

<sup>175</sup> Keessen, "Reducing the Judicial Deficit...", at 134.

<sup>176</sup> Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ 1990 L 117, 15–27).

<sup>177</sup> Pablo Amat Llombart, *Derecho de la Biotecnología y los transgénicos (Especial referencia al sector agrario y agroalimentario)*, Tirant lo Blanc (Valencia, 2008), at 215.

<sup>178</sup> Grace Skogstad, "Legitimacy and/or policy effectiveness?: network governance and GMO regulation in the European Union", 10(3) *Journal of European Public Policy*, (2003), 321-38, at 328. For a comparison with the much laxer approach of the United States, see Diana Lynch, and David Vogel, *The Regulation of GMOs in Europe and the United States: A Case-Study of Contemporary European Regulatory Politics*, Council of Foreign Relations Press (New York, 2001).

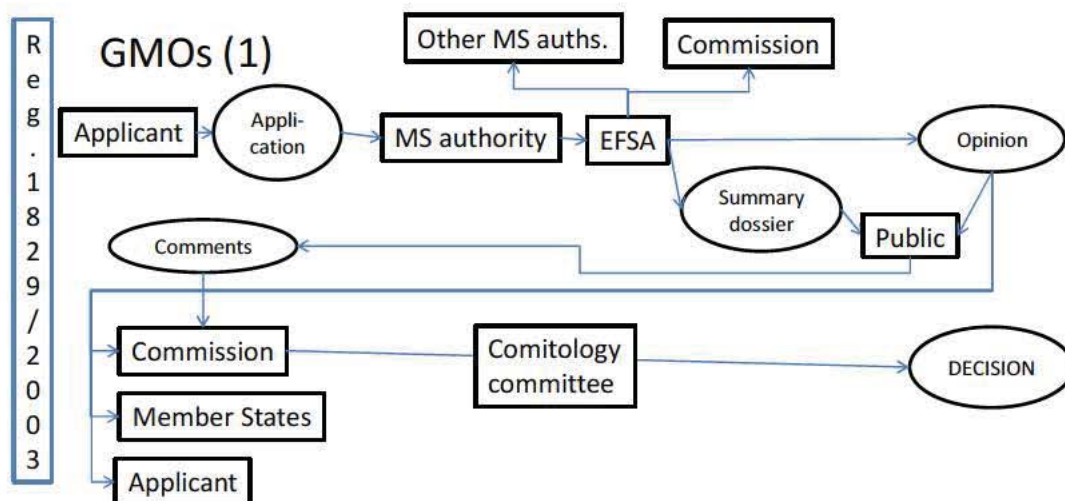
<sup>179</sup> The fact that in 2010 more than one million European citizens signed a petition, sponsored by Greenpeace, aimed at freezing the authorisation of GMOs provides evidence for this statement. See in more detail Raymond O'Rourke, *European Food Law*, Sweet and Maxwell (London, 2004), at 171.

<sup>180</sup> Thomas Christiansen and Josine Polak, "Comitology between Political Decision-Making and Technocratic Governance: Regulating GMOs", 1 *Eipascopia* (2009), 5-11, at 5. This article explains that due to the problems arising from the particular arrangement of interests, procedures in this area are highly problematic.

clear hierarchy<sup>181</sup>, at the same time that a compromise could be found between the more *liberal* and more *strict* regulatory approaches among Member States<sup>182</sup>.

The administrative procedure for authorisation of GMO consists of two phases governed by two different EU instruments.

The first is Regulation 1829/2003<sup>183</sup>. This piece of legislation applies to three types of products: a) GMOs for food and feed use; b) food and feed containing GMOs; and c) food and feed produces from or containing ingredients produced from GMOs<sup>184</sup>. Furthermore, the procedural arrangements are the same for all of them. There are different provisions for genetically modified food and genetically modified feed<sup>185</sup>, but the procedural steps are the same.



<sup>181</sup> Maria Lee, "Multi-level Governance of Genetically Modified Organisms in the European Union: Ambiguity and Hierarchy", in Luc Bodiguel and Michael Cardwell, *The Regulation of Genetically Modified Organisms Comparative Approaches*, 101-22, at 101.

<sup>182</sup> *Ibid.* at 105.

<sup>183</sup> Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ 2003 L 268, 1-23).

<sup>184</sup> Article 3(1).

<sup>185</sup> Chapter II (articles 3-14) on genetically modified food; and Chapter III (articles 15-26) on genetically modified feed.

The application for authorisation, together with a comprehensive dossier<sup>186</sup>, shall be sent to the national competent authority of the Member State<sup>187</sup>. The national authority shall forward the application to the EFSA, which shall inform the other Member States and the Commission and make a summary of the dossier available to the public<sup>188</sup>.

Within six months from the receipt of a valid application, the EFSA shall issue an opinion. This opinion can be in favour, with conditions or against the authorisation<sup>189</sup>. Together with a reasoned report, it shall forward its opinion to the Commission, the Member States and the applicant<sup>190</sup>. It shall also make it public so that other stakeholders may make comments to the Commission<sup>191</sup>.

Within three months after receiving the opinion, the Commission shall submit a draft decision to the comitology committee in charge<sup>192</sup>. From that moment, through an examination comitology procedure<sup>193</sup>, a decision shall be adopted granting or rejecting authorisation<sup>194</sup>.

As in the case of plant protection products, there is a second phase, but in this case, it is governed by a different instrument: Directive 2001/18/EC<sup>195</sup>. This Directive establishes the procedure for authorisation of the release into the environment of GMOs. This release may aim at placing GMOs on the market or at any other purposes than

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<sup>186</sup> Article 5(3) and 17(3).

<sup>187</sup> Articles 5(2)(a) and 17(2)(a).

<sup>188</sup> Articles 5(2)(b) and 17(2)(b).

<sup>189</sup> Articles 6(1) and 18(1).

<sup>190</sup> Articles 6(6) and 18(6).

<sup>191</sup> Articles 6(7) and 18(7).

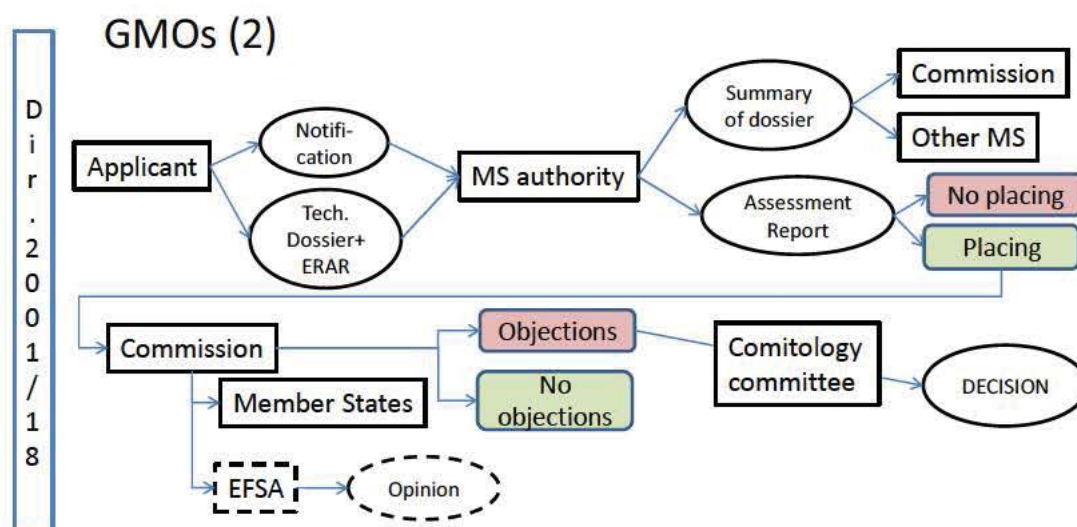
<sup>192</sup> Articles 7(1) and 19(1).

<sup>193</sup> Article 35(2) refers to articles 5 and 7 of Decision 1999/468/EC, that is, to the regulatory procedure. However, under the new comitology rules of Regulation (EU) No 182/2011 it is examination procedure that applies.

<sup>194</sup> Articles 7(4) and 19(4).

<sup>195</sup> Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, 1–39).

placing them on the market<sup>196</sup>. It is more relevant to examine the former from the point of view of composite procedures.



Any person intending to place a GMO in the market must submit a notification to the competent authority of the Member State<sup>197</sup>, together with a technical dossier and an environmental risk assessment report<sup>198</sup>. The national authority shall check that the information provided is complete and forward a summary of the dossier to the Commission and to the other Member States<sup>199</sup>.

Within ninety days after receipt of the notification the national authority must draw up an assessment report<sup>200</sup>. If it concludes that the GMO(s) should not be placed

<sup>196</sup> Article 1.

<sup>197</sup> Article 13(1).

<sup>198</sup> Article 13(2).

<sup>199</sup> Article 13(1).

<sup>200</sup> Article 14(2).

on the market, a reasoned decision shall be issued rejecting the notification<sup>201</sup>. If it concludes that the GMO(s) may be placed on the market it shall send the report to the Commission, which shall forward it to the other national authorities<sup>202</sup>. If neither of them raises a reasoned objection, the notified party will be given consent for placing the GMO(s) in the market<sup>203</sup>. The EFSA can be asked to issue an opinion by the Commission<sup>204</sup>. In case there is an objection, a decision shall be adopted by the Commission<sup>205</sup> thorough an examination comitology procedure<sup>206</sup>.

It all results in a very cautious approach in which the precautionary principle plays a critical role, in such a way that the rejections of authorisation is, overall, clearly favoured. Reluctant Member States have a way to oppose the placing of the market of these organisms, but they cannot veto them. In case of approval, they shall enjoy full free circulation in the internal market<sup>207</sup>.

It is particularly illuminating to analyse this procedure in comparison with the plan protection authorisation procedure. The intervening parties are the same; the interests at stake (health and consumer protection, internal market, economic and scientific development) are alike and the resolution is similar, a Commission's decision and regulation through an examination comitology procedure. Member States intervene in both cases, and have a powerful say. However the procedures cannot be assimilated. In both cases, the EFSA plays a critical role. Both cases are in a middle ground, between direct EU implementation and autonomous national implementation. In the case of plant protection products, the decision of a Member State is a reference decision for the rest. In the case of GMOs, the decision of a Member State, eventually endorsed by the Commission and a comitology committee if positive, is binding upon the others, and hence it can be called a transnational decision.

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<sup>201</sup> Article 15(2).

<sup>202</sup> Article 14(2).

<sup>203</sup> Article 15(3).

<sup>204</sup> Article 22(5)(c) of the Regulation 178/2002.

<sup>205</sup> Article 18(1).

<sup>206</sup> Article 30(2), again this provision refers to a regulatory procedure which, under Regulation (EU) No 182/2011, shall be substituted by the examination procedure.

<sup>207</sup> Article 22.



The structure of the procedure for the approval of GMOs diverges from that of plant protection products, but both are very illustrative examples of composite procedures from a strict point of view. In both cases the administrative procedure is characterised by an intense cooperation and, at some point of the sequence, the intervention of one actor is binding for the one that takes the final decision of authorisation.

#### *4.4.4.- Pharmaceuticals for human use*

The field of pharmaceuticals was one of the first areas where the need for European regulatory action was felt<sup>208</sup>. Not only was it necessary for the completion of the internal market, but the economic benefits of a unified system were felt by all the parties involved. Despite the fact that the various regulatory systems were designed to ensure a consistent standard of performance, safety, and quality, there were technical and procedural differences among Member States, leading to several, time-consuming processes and tests to meet each country's requirements. The system was expensive not only for pharmaceutical companies, but also for national health authorities<sup>209</sup>. Simultaneously, the public demanded new drugs as quickly, but also as safely, as possible<sup>210</sup>.

In response to concerns that the EU pharmaceutical industry was losing its competitiveness due to market divergence, the Commission assessed the possibilities of a deeper harmonisation from the nineties<sup>211</sup>. In its communication on single market in

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<sup>208</sup> Leigh Hancher, "The European Pharmaceutical Market: Problems of Partial Harmonisation", 15 *European Law Review* (1990), 9-33, at 12.

<sup>209</sup> The field of medicines is particularly prone to regulatory networks that need to go beyond national borders, saving the cost of multiple jurisdictions. The need to come up with a consensus based deliberation mechanism and to enshrine peer-review on scientific grounds as an efficient tool has placed the European procedures as a paradigm in a global context. See in this sense Alessandro Spina, "The Regulation of Pharmaceuticals Beyond the State: EU and Global Administrative Systems", in Edoardo Chiti and Bernardo Giorgio Mattarella, *Global Administrative Law and EU Administrative Law - Relationships, Legal Issues and Comparison*, Springer (Berlin, 2011), 249-68, at 250.

<sup>210</sup> Sally Shorthose and Mary Smillie, "Overview of European Pharmaceutical Regulatory Requirements, in Sally Shorthose (ed.), *Guide to EU Pharmaceutical Regulatory Law*, Kluwer Law International, (Alphen aan den Rijn, 2012), 3-32, at 6

<sup>211</sup> There were some directives before, like Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products (OJ 1965 22, 369 - 373), and later Council Directive 75/318/EEC of 20 May 1975 on the approximation of the laws of Member States relating to analytical, pharmaco-

pharmaceuticals of 1998<sup>212</sup> it stressed the need to harmonise the European market of pharmaceuticals. The other Institutions agreed that this market should be a priority<sup>213</sup>, but the Commission acknowledged that integration of the pharmaceuticals markets was complicated not only by the diverse interests involved but also by the unique nature of this sector, which is a research-based industry<sup>214</sup>.

There are also big differences between the national markets in pharmaceuticals, product of different conceptions of health systems, diverse disease incidence and certainly the disparate standards of living, all of which make demand for and consumption of pharmaceuticals, distribution costs, and public health care systems significantly diverging<sup>215</sup>.

While the Commission has long been pushing for a successful "euro-industry", Member States focus on the protection of defined national interest and diverging priorities<sup>216</sup>. There were specificities of a market what made it unfit for full integration, but especially reluctance of many Member States to full legal harmonisation led to other solutions being envisaged<sup>217</sup>, and it was only logical that composite procedures were relevant also in this field.

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toxicological and clinical standards and protocols in respect of the testing of proprietary medicinal products (OJ 1975 L 147, 1-12) and Second Council Directive 75/319/EEC of 20 May 1975 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products (OJ 1975 L 147, 13-22), but their scope and degree of harmonization was very limited. See Mark L. Burstall, "Europe After 1992: Implications for Pharmaceuticals", 10(3) *Health Affairs* (1991), 157-71.

<sup>212</sup> Communication from the Commission on the single market in pharmaceuticals of 25 November 1998 (COM/98/0588 final), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51998DC0588:EN:NOT>

<sup>213</sup> Resolution of the Council of 23 April 1996 and Resolution of the European Parliament of 16 April 1996 (OJ 1996 C141, 63).

<sup>214</sup> Communication from the Commission on the single market in pharmaceuticals of 25 November 1998, at page 2.

<sup>215</sup> Panaiotis Kanavos, "The Single Market for Pharmaceuticals in the European Union in Light of European Court of Justice Rulings" 18(6) *Pharmacoeconomics* (2000), 523-32, at 524.

<sup>216</sup> Govin Permanand, *EU Pharmaceutical Regulation: The Politics of Policy-Making*, Manchester University Press (Manchester, 2006), at 79-81.

<sup>217</sup> Govin Permanand and Christa Altenstetter, "The politics of pharmaceuticals in the European Union", in Elias Mossialos, Monique Mrazek, and Tom Walley (eds.), *Regulating Pharmaceuticals in Europe: Striving for Efficiency, Equity and Quality*, Open University Press (Maidenhead, 2004), 38-54, at 40.

Since its establishment in 1995, the European Medicines Agency (hereinafter EMA) has made notable harmonisation efforts with testing guidelines, assessment of quality, safety and efficacy<sup>218</sup>, and had a conception of its roles as a facilitator of cooperation and shared technical expertise among its many partners and stockholders<sup>219</sup>. More relevant from our procedural point of view, a pragmatic approach was designed consisting of staged introduction of normal market mechanisms in the subsectors ready for convergence wherever possible without compromising patients' access to medicines at an affordable cost or the Member States' public health expenditure objectives.

As a result, under the current rules there are several procedures that emerged as a middle ground between the alternatives of full harmonisation and mere interstate cooperation<sup>220</sup>: a centralised procedure, a decentralised procedure, a mutual-recognition procedure, and purely national authorisation procedures. Indeed, this field comprises special national interests and a difficult achievement of an internal market, and it is thus especially prone to composite procedures. The main instrument in this field is Regulation 726/2004<sup>221</sup>, amended on several occasions<sup>222</sup>.

The existence of these different procedures shows that even with the relevant participation of Member States, composite procedures entail a notable harmonisation, in the field where they are not willing to yield competences when it is not deemed strictly necessary for the functioning of the internal market.

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<sup>218</sup> Claudia Desous, *Competition and Innovation in the EU Regulation of Pharmaceuticals*, Intersentia (Cambridge, 2011), at 34.

<sup>219</sup> Thomas Lönngren, "The European Medicines Agency: preparing the ground for the future", in José Luis Valverde and Paul Weissenberg (eds.) *The Challenges of the New EU Pharmaceutical Legislation*, IOS Press (Amsterdam, 2005), 69-72, at 69.

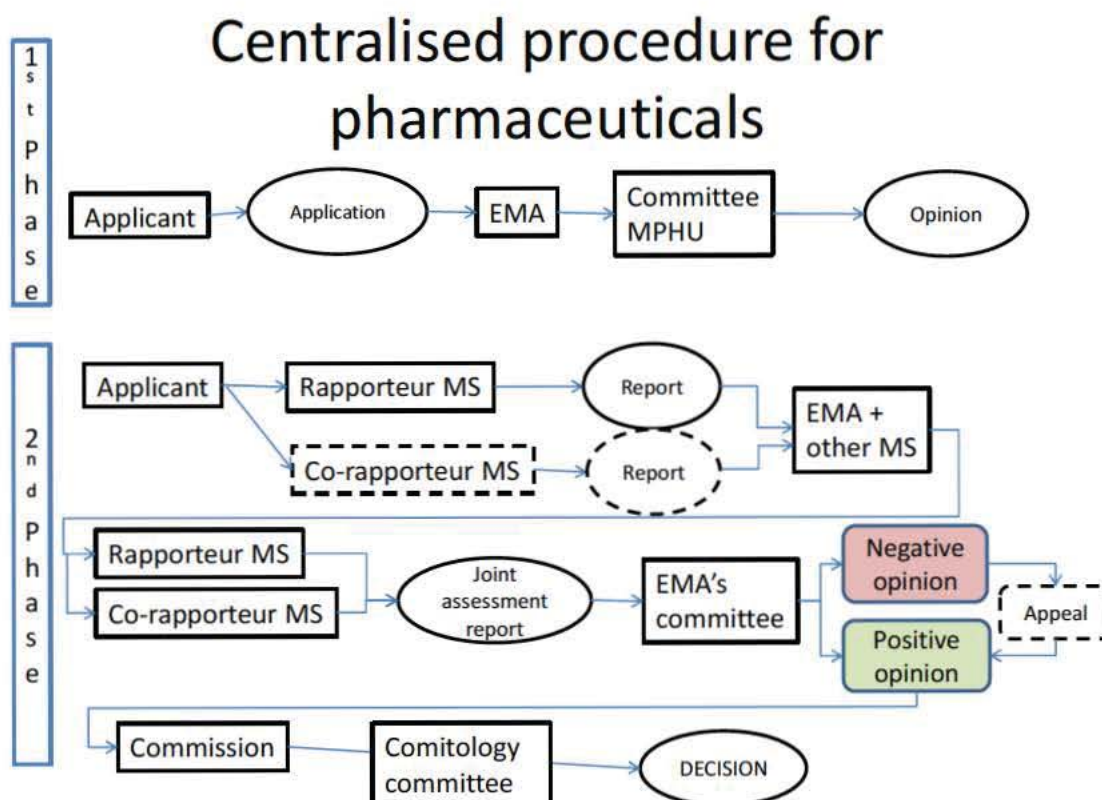
<sup>220</sup> Leight Hancher, "The European Community dimension: coordinating divergence", in Elias Mossialos, Monique Mrazek, and Tom Walley (eds.), *Regulating Pharmaceuticals in Europe: Striving for Efficiency, Equity and Quality*, Open University Press (Maidenhead, 2004), 55-77, at 60.

<sup>221</sup> Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, 1-68).

<sup>222</sup> Regulation (EC) No 1901/2006 of the European Parliament and of the Council of 12 December 2006 (OJ 2006 L 378, 1); Regulation (EC) No 1394/2007 of the European Parliament and of the Council of 13 November 2007 (OJ 2007 L 324, 121); Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 87, 109); Regulation (EC) No 470/2009 of the European Parliament and of the Council of 6 May 2009 (OJ 2009 L 152, 11); and Regulation (EU) No 1235/2010 of the European Parliament and of the Council of 15 December 2010 (OJ 2006 L 348, 1).



The centralised procedure is restricted to certain listed pharmaceuticals<sup>223</sup> but other new active substances may also be accepted for consideration under the centralized procedure when it can be shown that the product constitutes a significant therapeutic, scientific or technical innovation, or the granting of a Union authorisation is in the best interest of patients<sup>224</sup>.



The procedure starts with a pre-authorisation phase<sup>225</sup>. At least seven months prior to submitting a marketing authorisation application, a sponsor must notify the EMA of their intention to submit an application and the month of submission. This pre-submission requires a variety of information including a document outlining the reasons

<sup>223</sup> According to the annex of Regulation 726/2004, these are the following: a) biologic drugs developed by recombinant technology, controlled expression of genes coding for biologically active proteins in prokaryotes and eukaryotes including transformed mammalian cells, and hybridoma and monoclonal antibody methods; b) medicinal products containing new active substances for the following indications: AIDS, cancer, neurodegenerative disorders, diabetes, autoimmune diseases and other immune dysfunctions, and viral diseases; and c) orphan medicinal products.

<sup>224</sup> Article 3(2).

<sup>225</sup> Article 7.

why the sponsor believes the application should fall under the centralized procedure. The Committee for Medicinal Products for Human Use<sup>226</sup> shall be responsible for analysing the information submitted and for drawing up the opinion of the Agency<sup>227</sup>. The Committee may request the competent authority of a Member State the information showing that the manufacturer of a medicinal product concerned and carry out the necessary control tests<sup>228</sup>. Once the decision regarding acceptance of marketing authorisation application has been taken, the EMA will notify the applicant accordingly<sup>229</sup>.

Following the acceptance of the marketing authorisation application, a rapporteur is selected<sup>230</sup>. The rapporteur is a regulatory authority from an EU Member State. In certain cases, a co-rapporteur may be appointed<sup>231</sup>. The selection of the rapporteur is based on objective criteria, in order to ensure objective scientific opinion and the best use of available expertise at the EMA<sup>232</sup>. The two Rapporteurs draw on the expertise of their national agency staff and external experts in the field to prepare the two separate assessment reports within seventy days.

Each report makes a provisional recommendation on whether or not marketing authorisation shall be granted and, eventually, lists any objections and points of clarifications it deems necessary. The reports are forwarded to the other Member State authorities, who have thirty days to comment, and to the EMA. After a discussion, a document is sent to the applicant, who shall forward a reply. Once the response has been sent, the rapporteurs prepare a Joint Assessment Report within thirty days and the Committee may make comments within twenty days.

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<sup>226</sup> The CHMP is composed of a chairperson, one member nominated by each Member State, one member nominated by each EFTA state, and up to five co-opted members chosen among experts nominated by Member States or the EMA. Article 61(1).

<sup>227</sup> Article 5(2).

<sup>228</sup> Article 8.

<sup>229</sup> Article 9.

<sup>230</sup> Article 62(1).

<sup>231</sup> *Ibid.*

<sup>232</sup> Notice to Applicants, volume 2A, Chapter 4, Centralized procedure, Rules governing medicinal products in the European Community (ENTRE/F2/BL D[2006]).

The Committee shall then reach an opinion<sup>233</sup> within 210 days since the procedure formally started and an assessment report. This report shall be adopted if possible by consensus, and otherwise by absolute majority. If the opinion is negative, the applicant has a right of appeal, and then eventually a second opinion is issued. In case of a positive opinion, or a negative opinion that has been appealed, the Commission shall prepare a draft decision<sup>234</sup>. Following a comitology procedure<sup>235</sup> the Decision of the Commission shall eventually be adopted and published so the new medicine would have EU wide authorisation to be freely marketed<sup>236</sup>.

This procedure reveals a complex co-operation between Member States and EU authorities, where the successive inputs have different legal effects (sometimes binding, sometimes not). Being such a technical area, the procedure responds again to the precautionary principle, while trying to gather as much relevant expertise as possible. This centralised procedure has been successful in terms of efficiency but also, unlike some of the previous areas of risk regulation, in generating consumer confidence; leading to a possible future extension of its scope<sup>237</sup>.

The mutual recognition procedure can be used when an authorisation has already been granted in one Member State and the applicant wishes to extend it to other Member States. In principle, the procedure remains at the interstate level but it is regulated by a EU instrument, Directive 2001/83/EC<sup>238</sup>. It simplifies the national authorisation procedure inasmuch as the concerned Member State will only have to authorise the medicinal product based on the assessment report drafted by the reference Member State<sup>239</sup>.

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<sup>233</sup> Article 6(3).

<sup>234</sup> Article 10(1).

<sup>235</sup> Article 87(3) refers to the management procedure which, under the current rules of comitology in Regulation (EU) No 182/2011, has been replaced by examination procedure.

<sup>236</sup> Article 10(2) and 87(3).

<sup>237</sup> Sebastian Krapohl, *Risk Regulation in the Single Market: The Governance of Pharmaceuticals and Foodstuffs in the European Union*, Palgrave (Basingstoke, 2008), at 102.

<sup>238</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ 2001 L 311, 67.

<sup>239</sup> Article 28(4).

However, if the concerned Member State has objections, a dispute procedure begins where both Member States must use their best endeavours to reach an agreement<sup>240</sup>. If they are unable to reach an agreement, the Committee for medicinal products for human use is called to arbitrate<sup>241</sup>. Taking into consideration the points of disagreement, the Committee issues an opinion, which must be eventually confirmed by the Commission<sup>242</sup>. The decision of the Commission can be appealed by Member States to the Standing Committee referred above under a comitology procedure<sup>243</sup>. The decision shall be binding to Member States<sup>244</sup>. This is thus also a composite procedure but in inverse direction.

Finally, there is a decentralised procedure with a similar structure as the mutual recognition procedure except that it applies to pharmaceuticals which have not received a marketing authorisation in any Member State. An identical application is submitted to the competent authorities of the different Member States simultaneously, but one of them shall act as reference Member State<sup>245</sup>. The eventual authorisation is granted individually, but once the reference Member State has issued the authorisation, the others may only refuse to grant it on the grounds of potential risk to public health. In case of disagreement, negotiation is facilitated to reach a compromise. If it is not possible, a procedure similar to the one for mutual recognition follows with the intervention of the Committee for medicinal products for human use<sup>246</sup> and the Commission, eventual though a comitology procedure reaches a final resolution<sup>247</sup>.

All those procedures are composite in the sense that there is an intense cooperation between national and European authorities during the different steps. However, from a strict point of view, they are a less characteristic example of composite procedures as the binding element of the intervention is less clear than in the previous

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<sup>240</sup> Article 29(2).

<sup>241</sup> Article 29(3).

<sup>242</sup> Article 32.

<sup>243</sup> Article 121(2), refers to the regulatory procedure which, under the current rules of comitology in Regulation (EU) No 182/2011, has been replaced by examination procedure.

<sup>244</sup> Article 34(3).

<sup>245</sup> Article 28.

<sup>246</sup> Article 30.

<sup>247</sup> Article 34.

procedures described (plant protection products, GMOs, and, as will be examined next, biocides).

#### 4.4.5.- *Biocides*

Biocides are substances or microorganisms which can deter, render harmless, or exert a controlling effect on any harmful organism by chemical or biological means. Although pesticides can fall under the scope of this definition, in EU law they are treated differently<sup>248</sup>. Like pesticides, biocides are aimed at killing living organisms, and for this reason biocidal products can pose significant risk to human health and welfare. Examples of biocides include disinfectants for human hygiene, disinfectants for water treatment or preservatives for wood, masonry or other materials.

The first significant harmonising approach to the approval of biocides was put in place in Directive 98/8/EC<sup>249</sup>. The former biocides Directive introduced a two-step process of approval that entailed a first evaluation of the active substance at the Union level, and a subsequent product authorisation at Member State level, a structure that is common to other composite procedures which have been analyzed. This was intended to be done progressively according to a list of different products<sup>250</sup>. Even at the level of the national authorisation, cooperation was still very intense, and a mutual recognition procedure was also established to facilitate the subsequent authorisation of a product by the manufacturer across the different countries<sup>251</sup>.

The new Regulation 528/2012<sup>252</sup> keeps this two-step scheme while providing for the possibility that some biocidal products be authorised at the Union level thus gaining direct access to the entire internal market. In this sense, the new rules stem from the

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<sup>248</sup> See section 4.4.2.

<sup>249</sup> Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (OJ 1998 L 123, 1-63).

<sup>250</sup> See, Rita Eklund and Jenny Karsson, "Assessing chemical risks: evaluating products rather than substances, and the case of anti-fouling paints", in Johan Eriksson, Michael Gilek, Christina Rudén (eds.), *Regulating Chemical Risks: European and Global Challenges*, Springer (Dordrecht, 2010), at 168.

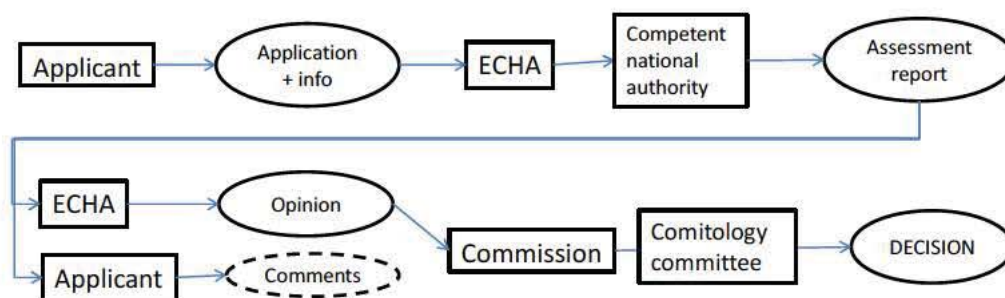
<sup>251</sup> A burden to the mutual recognition was the difference in climatic conditions. For instance, in a country with a colder the degradation rate of a substance is slowed down so the product may pose a greater risk to human life than in a warmer country, where the authorities can afford to have a laxer approach.

<sup>252</sup> Regulation (EU) No. 528/2012 of the European Parliament and of the Council concerning the making available on the market and use of biocidal products (OJ 2012 L 167, 1-123).



need to establish a Union list of active substances approved for use in biocidal products hence improving legal certainty and facilitating access to the Single Market, while strengthening the role of the ECHA<sup>253</sup> in the procedures.

## Biocides



Indeed, the Regulation contains not only a procedure to list biocides authorised at the EU level, but a number of other procedures. These include authorisation of “biocidal product families”; single Union authorisation for certain product types; mutual recognition in parallel; successive mutual recognition; simplified authorisation procedure; and parallel trade permit. Successive mutual recognition and simplified authorisation procedure are basically national procedures that rely heavily on the cooperation on other Member States and/or the ECHA. Their traits are similar to the procedures under the same name applicable to pharmaceuticals, so only the single EU authorisation procedure will be examined, as it is the only one that qualifies as a composite procedure *stricto sensu*.

<sup>253</sup> The European Chemicals Agency the agency which manages the technical, scientific and administrative aspects of the implementation of the European Union policies concerning biocides and chemicals. Mainly known for its roles in the regulation for Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), ECHA also has a role in the authorisation of biocides.

The procedure for a single Union authorisation of biocidal products is restricted to certain product types, whose number shall be enlarged at different stages<sup>254</sup>. The applicant shall submit an application with certain information<sup>255</sup> to the ECHA<sup>256</sup>, which shall forward it immediately to the national authority selected by the applicant<sup>257</sup>.

The national competent authority shall validate the application upon checking that the relevant information has been submitted<sup>258</sup>. Otherwise it shall request the applicant to complete it<sup>259</sup>. From the date of validation, the national authority has one year to evaluate the application<sup>260</sup> and draw up an assessment report<sup>261</sup>. This will involve risk assessment for human health and the environment in the context of the intended use and to establish any additional necessary conditions<sup>262</sup>. This report shall be sent to the applicant, who can make comments in thirty days<sup>263</sup>. Then the report shall be forwarded to the ECHA<sup>264</sup>.

Within 180 days after the receipt of the conclusions of the evaluation, ECHA shall prepare an opinion on the authorisation of the biocidal product for the Commission<sup>265</sup>. Upon its reception, the Commission shall adopt an implementing

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<sup>254</sup> Article 42 states that Union authorisation may be granted from 1 September 2013 for product types 1, 3, 4, 5, 18 and 19; from 1 January 2017 for product types 2, 6 and 13; and from 1 January 2020 onwards to the remaining products types 7, 8, 9, 10, 11, 12, 16 and 22.

<sup>255</sup> This information includes an application form; a dossier that satisfies the requirements of Annex II and Annex III of EU BPR; a copy of the proposed label and Safety Data Sheet for the biocidal product; a safety data sheet for all active and non-active substances; a draft summary of product characteristics; and the national competent authority selected.

<sup>256</sup> For this purpose there is an internet register for biocidal products available at <https://webgate.ec.europa.eu/env/r4bp2/>

<sup>257</sup> Article 43(2).

<sup>258</sup> Article 43(3).

<sup>259</sup> Article 43(4).

<sup>260</sup> Article 44(1).

<sup>261</sup> Article 44(3).

<sup>262</sup> Article 21(2).

<sup>263</sup> Article 44(1).

<sup>264</sup> *Idem*.

<sup>265</sup> Article 44(2), if the opinion recommends the authorisation, it shall include: a statement on whether the conditions for approval are fulfilled; a draft summary of biocidal product characteristics; details of any terms or conditions which should be imposed; and the final assessment report.

regulation that shall eventually grant the Union authorisation to the biocidal product<sup>266</sup> through an examination comitology procedure<sup>267</sup>.

There is another mechanism for operators to market biocidal products; the mutual recognition that places a much more relevant role on national authorities. here are two processes for mutual recognition. These are mutual recognition in sequence and mutual recognition in parallel.

The mutual recognition in sequence procedure can apply if a national authorisation is granted already in one Member State. Applicants shall submit an application to the competent authorities of the Member State or Member States where they seek recognition. The application must include, in particular, the national authorisation granted by the reference Member State and, eventually, its translation<sup>268</sup>. It shall be submitted to the register of ECHA, which will forward it to the concerned Member State.

The submitted application and dossier will be evaluated to check the risks to health and the environment, intended use and efficacy taking into account the first evaluation by the reference Member State within thirty days<sup>269</sup>.

If the concerned Member State disagrees with the evaluation done by the reference Member State, they will be referred to a Coordination Group<sup>270</sup>, which has 60 days to seek agreement<sup>271</sup>. If the Coordination group agrees with the concerned Member State, the biocidal product will not be authorised. If an agreement cannot be reached, the matter is referred to the Commission, which may ask ECHA for an opinion on the

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<sup>266</sup> Article 44(5).

<sup>267</sup> Article 82(3), which refers to the Standing Committee on Biocidal Products.

<sup>268</sup> Article 33(1).

<sup>269</sup> Article 33(2).

<sup>270</sup> All Member States and the Commission can participate in the group, for which the ECHA will provide the secretariat.

<sup>271</sup> Article 35(1).



scientific or technical aspects of the case<sup>272</sup>. In this case, it is for the Commission to make a final decision<sup>273</sup>, through the same comitology procedure referred above.

Similar rules apply in the procedure of mutual recognition in parallel. In this case, the first national authorisation procedure is launched simultaneously as the application for mutual recognition<sup>274</sup>. The reference Member State authority must first evaluate the application, while the other national shall wait until the authorisation is, eventually, granted within one year<sup>275</sup>. Then, the other Member States shall validate that authorisation within thirty days. If they disagree, the question is referred to the Coordination Group and, if disagreement persists, the Commission shall decide.

The procedure for the authorisation of biocidal is a clear example of the move towards a more centralized procedure in the European Union, as results from the comparison between Directive 8/98/EC and Regulation 528/2012. It is also an example of a relatively simple composite procedure where the characteristics are easily visible.

#### 4.4.6.- Chemicals

Chemicals have been subject to European normative action since Directive 67/548<sup>276</sup> when only approximation of national law on certain aspects of chemicals was envisaged<sup>277</sup>. The initial aim was to check the main hazards related to chemicals, but progressively other interests were covered by subsequent directives, like consumer protection<sup>278</sup> and environmental concerns<sup>279</sup>.

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<sup>272</sup> Article 36(1).

<sup>273</sup> Article 36(2).

<sup>274</sup> Article 34(1).

<sup>275</sup> Article 34(4).

<sup>276</sup> Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ 1967 196, 1–98).

<sup>277</sup> Those aspects were mainly the classification of the substances; their packaging; and their labeling. *See further* Ángel Manuel Moreno Molina, *El régimen jurídico de los productos químicos en la Unión Europea*, Iustel (Madrid, 2010), at 36.

<sup>278</sup> Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1976 L 262, 27.9.1976, 201–203).

Health and environmental protection were the key elements of the Commission's renewed policy on chemicals best illustrated in the White Paper COM(2001) 88 final "Strategy for a future Chemicals Policy"<sup>280</sup>. Its conclusions led to the discussion and, after years of political debates and interinstitutional discussions<sup>281</sup>, the adoption of Regulation 1907/2006<sup>282</sup>, the most important piece of legislation in the domain of chemicals. It entered into force at different times for each part of it and it has been amended on many occasions to reflect the progress of science<sup>283</sup>. Legal experts have characterised this piece of legislation as the product of the compromise between human health and environmental protection, on the one hand, and economic development and market-oriented rules, on the other<sup>284</sup>. The many risks and hazards related to chemicals brought about a more intense and centralized intervention than in other sectors<sup>285</sup> where risk assessment is essential, and hence a reinforced interest for a unified procedure prevails; a rationale that operates in detriment of the intervention of Member States. However, like in the other areas where composite procedures have been established, a compromise guaranteed that they also played a relevant role.

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<sup>279</sup> Council Directive 79/831/EEC of 18 September 1979 amending for the sixth time Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ 1979 L 259 , 10 – 28).

<sup>280</sup> COM(2001) 88 final White Paper "Strategy for a future Chemicals Policy" presented by the Commission on 27 February 2001, available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0088en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0088en01.pdf)

<sup>281</sup> See for an insider's perspective of the legislative process for the adoption of the REACH Regulation Guido Sacconi, *REACHstory - Il racconto di un successo della buona politica*, Guerini e Associati (Milan, 2008).

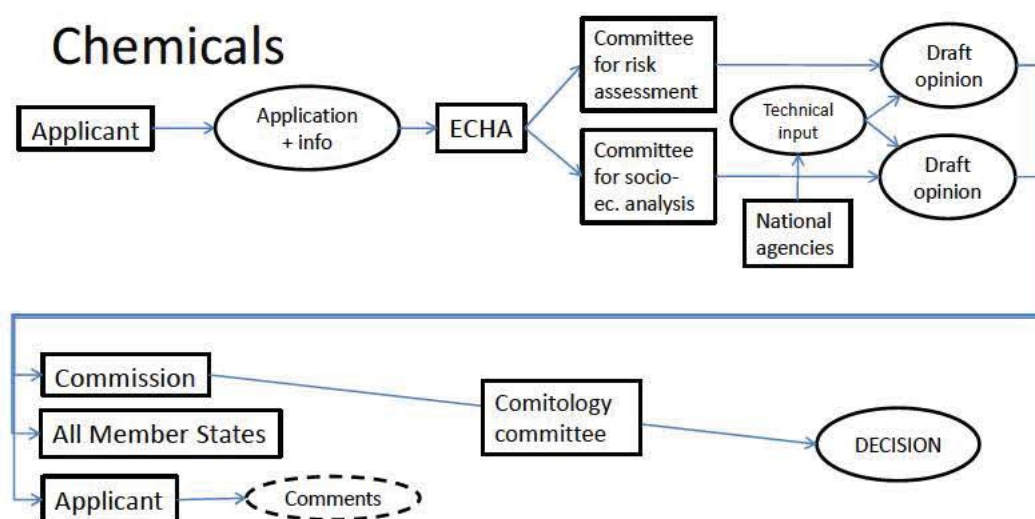
<sup>282</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, 1–849).

<sup>283</sup> Moreno Molina, *El regimen jurídico...*, at 46.

<sup>284</sup> Arnold van der Wielen, "REACH: Next Step to Sound Chemicals Management", in Philip Wexler, *Chemicals, Environment, Health: A Global Management Perspective*, Taylor & Francis (Boca Raton, FL, 2012), 617-636, at 618-619; and Eckard Reh binder, "Die REACH-Verordnung – Entstehungsgeschichte, Zielsetzung, Anwendungsbereich, Hauptinhalte", in Reinhard Hendler (ed.), *Neues europäisches Chemikalienrecht (REACH) 23. Trierer Kolloquium zum Umwelt- und Technikrecht vom 2. bis 4. September 2007*, Erich Schmidt Verlag (Berlin, 2008).

<sup>285</sup> Nihan Margossian, *Le règlement REACH: La réglementation européenne sur les produits chimiques*, Dunod (Paris, 2007), at 20.

Chemicals are subject to an intense regulatory action by the ECHA. Activities which are part of the so-called REACH system include evaluation, which makes it possible for the ECHA to check that industry is fulfilling its obligations<sup>286</sup>; or registration, which makes it compulsory to register in a central database of chemicals which are manufactured or imported in quantities of one tonne or more per annum<sup>287</sup>. The ECHA has devoted the largest share of its resources and time to the registration procedure, in which the national authorities can also play a role. The precautionary principle is at the core of the risk assessment in the REACH regulation, similarly to the biocides and pesticides. However, unlike those regulations, a more centralized procedure has been laid down, limiting the intervention of national authorities<sup>288</sup>.



<sup>286</sup> Articles 40 to 54.

<sup>287</sup> Articles 5 to 24.

<sup>288</sup> Bjorn G. Hansen and Mark Blainey, "REACH: A Step Change in the Management of Chemicals", 15 (3), *Review of European, Comparative and International Environmental Law* (2006), 270-80, at 279.

The general procedure for the authorisation of chemical substances must be triggered by private operators. This authorisation procedure is limited to substances included in Annex XIV of the Regulation, that is, substances of extremely high concern<sup>289</sup>. The application shall be submitted to the ECHA<sup>290</sup> together with some information<sup>291</sup>. Once the ECHA receives the application, the Agency's Committees for Risk Assessment and Socioeconomic Analysis shall give their draft opinions within ten months<sup>292</sup>. Member States experts take part in the committees and, in practice, the scientific and technical controls aimed at assessing the compliance with the different chemical standards of safety are carried out by national agencies or institutes. Their evaluations do not have to be followed by the committees of the ECHA but the experience shows that the committees do rely on the work of the national experts due to the very specialised technical expertise required to perform the tests and obtain the relevant results.

Afterwards, the applicant has the right to comment on the draft opinions by the committees<sup>293</sup>. The Member States and the Commission shall be forwarded these opinions as well<sup>294</sup>. It is the Commission which shall prepare a draft authorisation decision within three months of receipt of the opinions from the ECHA<sup>295</sup>. The final decision granting or refusing the authorisation shall be taken in through an examination comitology procedure<sup>296</sup>.

Member States thus are formally informed of the opinions in preparation of the procedure and are involved in the decision-making procedure, by taking part in the two Committees of the ECHA and subsequently in the comitology committee. Besides their involvement, which is embedded in institutionalised collegial bodies, Member States do provide with a relevant input, much more relevant than in practical terms it would seem

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<sup>289</sup> Article 56(1).

<sup>290</sup> Article 62(1).

<sup>291</sup> Article 62(4) including the identity of the substance; the identity of the applicant; the uses for which authorisation is sought; a chemical safety report; and an analysis of the alternatives considering their risks.

<sup>292</sup> Article 64(1).

<sup>293</sup> Article 64(5).

<sup>294</sup> *Ibid.*

<sup>295</sup> Article 64(8).

<sup>296</sup> Article 133.

just by looking at the REACH regulation. This is due to the fact that the technical tests are performed by national agencies and institutes, whose results are most usually followed, even though they are not legally mandatory.

The scheme established by the REACH regulation is, thus, different from the previous examples that we have seen, inasmuch as the formal role of national authorities is less relevant. However, the procedure does entail in practice an intense cooperation that remains quite visible. From the strict point of view on the concept of composite procedures, the element of a bonding intervention of national authorities is hard to see, unless one is aware of the practical functioning of the cooperation. Although it is not obvious when reading the text of the regulation, the national level of decision making is essential because it is there that the technical expertise necessary for a sound decision lies. For instance, the technical evaluation of chemical substances fall under the competence of one or more Member States. It is national authorities that carry out the technical assessment and forward the results to the ECHA, which formally takes a decision. Perhaps, this serves as an example that a too rigid, dogmatic approach on composite procedures is of little use as the legislator designed the administrative procedures without a particular legal pattern in mind. The design rather takes the form of a sequence of successive interventions of the different actors aimed at keeping difficult balances between the need for a centralised decision-making procedure for European-wide authorisation of chemicals and the reality of the source of expertise and know-how that remains at the national level.

#### *4.4.7.- Management of European funds*

The management of European funds often entails the participation of both the Commission and the competent Member State authorities. The procedural arrangements thought which the allocation and control of those funds take place can many times be characterised as composite<sup>297</sup>. There are two main areas where shared management of European funds is relevant, Common Agricultural Policy and Structural Funds. They

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<sup>297</sup> Hans Christian Röhl, "Procedures in the European Composite Administration", in Javier Barnes (ed.) *Transformación del Procedimiento Administrativo*, Editorial del Derecho Global (Sevilla, 2008), 75-96, at 88.

all will be analysed in this section. However, similar schemes of shared responsibilities are increasingly being used in other areas, like development cooperation<sup>298</sup>.

These European funds are permanent financial instruments designed to assist the Commission and the Members States in setting up, implementing and financing the structural policy of the Union, thus contributing to the development of projects in Members States<sup>299</sup>. Although each individual fund is based on different provisions of primary law<sup>300</sup>, their legal framework is essentially the same<sup>301</sup>. We will distinguish the funds in the framework of the Common Agricultural Policy from the other Structural Funds.

The Common Agricultural Policy has been a core element of the old European Economic Community<sup>302</sup>, as recognized in the Treaties<sup>303</sup>, and the European Union's most important policy in terms of the portion of the EU's budget allocated to it<sup>304</sup>. The financing of agricultural policy has been based on different schemes of cooperation between the European and the national and subnational authorities<sup>305</sup>. The mechanism of agriculture support put in place in the years following the creation of the EEC and the direct finance by the EC budget remained stable for about thirty years, until the reforms of the nineties<sup>306</sup>. From 1992, in part due to the negotiations relating to the World Trade

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<sup>298</sup> Fuentetaja Pastor, *La Administración Europea...*, at 446.

<sup>299</sup> Schöndorf-Haubold, "Common European Administration...", at 26.

<sup>300</sup> Namely, Article 40(3) TFEU for the agricultural funds; Articles 162-164 TFEU for the European Social Fund; and Article 176 TFEU for the European Regional Development Fund.

<sup>301</sup> Schöndorf-Haubold, "Common European Administration...", at 27.

<sup>302</sup> In this vein, the Spaak Report or or Brussels Report on the General Common Market of 1956 emphasised that agriculture had to be one of the central elements of the European economic integration. See in the link <http://www.unizar.es/euroconstitucion/library/historic%20documents/Rome/preparation/Spaak%20report%20fr.pdf>, at page 50.

<sup>303</sup> Michael Cardwell, *The European Model of Agriculture*, Oxford University Press (Oxford, 2004), at 8.

<sup>304</sup> The proportion of the European budget devoted to agriculture was 70% at its peak. Today, it remains at approximately 40%, see Daniele Bianchi, *La politique agricole commune (PAC) - Précis de droit agricole*, Bruyant (Bruxelles, 2012), at 15.

<sup>305</sup> Isabelle Garzon, *Reforming the Common Agricultural Policy: History of a Paradigm Shift*, Palgrave-MacMillan (Basingstoke, 2006), at 178.

<sup>306</sup> *Ibid.*, at 21.



Organization<sup>307</sup>, in part due to a change in priorities and the need for protection of human health and environmental concerns there was a major overhaul in agricultural policies<sup>308</sup>.

Even with the reform, for the purposes of this analysis, what is important is that public intervention in the agricultural markets has taken place and still does via subsidies<sup>309</sup>. Subsidies play a major role even though there have been a move from a state assisted model to a more liberal one<sup>310</sup>.

Two funds are essential in the implementation of European agricultural policy, the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). The former finances direct payments to farmers and measures to respond to market disturbances, while the latter finances the rural development programmes of the Member States<sup>311</sup>.

The EAGF entails direct payments to individual beneficiaries. Although the Commission manages the fund, the tasks of handling the funds individually is normally delegated onto Member States, which either manage the payments at national level or have regions or other entities in charge of those tasks. Even after the reforms, agricultural funds still account for the largest share of the budget of the European Union<sup>312</sup>. The legal instrument for the management of agricultural funds have been progressively amended and repealed<sup>313</sup>, but the basic scheme remains valid today.

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<sup>307</sup> Casten Daugbjerg and Alan Swinbank, "Ideational change in the WTO and its impacts on EU Agricultural Policy Instruments and the CAP", in Grace Skogstad and Amy Verdun (eds.), *The common agricultural policy: policy dynamics in a changing context*, Routledge (London, 2009), 44-60, at 57.

<sup>308</sup> Joseph A. McMahon, *EU Agricultural Law*, Oxford University Press (Oxford, 2007), at 95.

<sup>309</sup> Pedro Brufao Curiel, *Subvenciones Agrarias, Desarrollo Rural y Medio Ambiente*, Comares (Granada, 2007), at 320.

<sup>310</sup> Garzón, *Reforming the Common...*, at 180.

<sup>311</sup> Alberto Germanò and Eva Rook Basile, *Manuale di diritto agrario comunitario*, Giappichelli Editore (Turin, 2010), at 203.

<sup>312</sup> Roberto Henke and others, *The CAP in the EU budget: new objectives and financial principles for the review of the agricultural budget after 2013*, Study by the Directorate General of Internal Policies of the European Parliament (2011), at page 27, available at <http://www.europarl.europa.eu/studies>

<sup>313</sup> Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ 1977 L 51, 1-6); Council Regulation (EEC) No 4256/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the EAGGF Guidance Section (OJ 1988 L 374, 25-28); Council

The management arrangements entail that while national authorities pay and control the expenditure for agricultural and rural development subsidies, the Commission is responsible for the administration of payments and for auditing the control system of Member States<sup>314</sup>. Several of the procedures to implement the common agricultural policy are composite.

One example is the procedure for the preparation approval and review of rural development programmes. These programmes shall be prepared by national authorities<sup>315</sup>, with the cooperation of the local authorities, economic and social partners, and representatives<sup>316</sup>, and shall cover a number of aspects<sup>317</sup>. These programmes must be in line with the Community strategic guidelines, adopted at the Union level by the Council<sup>318</sup>. The Commission is in charge of assessing whether the proposed programme is coherent with the strategic guidelines<sup>319</sup>. If it is not, the Member State concerned will have to revise it. The decision of the Commission must be taken through a comitology procedure<sup>320</sup>. The review of those programmes also requires the intervention of Member States in their proposals and the Commission in their approval<sup>321</sup>.

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Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, 80–102); and Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, 1-74).

<sup>314</sup> Athéné Neszmélyi, "Interplay between the European Commission and Member states – Review of subsidy withdrawals by new member states ", 12 *Gazdálkodás* (2005), 28-36, at 29.

<sup>315</sup> Article 18(1) of Regulation (EC) No 1698/2005.

<sup>316</sup> Article 6.

<sup>317</sup> Articles 18(2) and 16; Each rural development programme shall include: an analysis of the situation in terms of strengths and weaknesses, the strategy chosen to meet them and an *ex ante* evaluation; a justification of the priorities chosen having regard to the Community strategic guidelines and the national strategy plan; information on the axes and measures proposed for each axis and their description; a financing plan; the elements needed for the appraisal under competition rules; information on the complementarity with the measures financed by the other common agricultural policy instruments; and programme implementing arrangements.

<sup>318</sup> Article 9.

<sup>319</sup> Article 18(3).

<sup>320</sup> Articles 1(4) and 90(2). They refer to the management procedure that, under the current rules of Regulation No 182/2011 has been replaced by the examination procedure.

<sup>321</sup> Article 19.



Another example can be found in the procedures for awarding subsidies to individual beneficiaries. Although the current system entrusts most of the tasks to national authorities who are accountable to the Commission for the distribution of funds, in the past the arrangements also constituted composite procedures with the aim of awarding grants. The clearest example is the system under the old Regulation 355/77, which gave rise to the *Borelli* case which shall be examined extensively in the following Chapter<sup>322</sup>. This procedure started with the application with the individual interested in carrying out a project for developing storage, preservation or processing of agricultural products or their marketing channels<sup>323</sup>. Those applications had to be submitted by the Member State concerned to the Commission<sup>324</sup>. The Commission had to decide through a comitology procedure<sup>325</sup>, but the prior approval by the competent authority in the territory where the project was to be carried out<sup>326</sup>.

The patterns that we have shown as examples are less intricate than some of the previous areas examined. Their composite nature lies on the fact that both national and EU authorities have to give subsequent approvals in an administrative sequence in order to reach a final decision. The procedures in the field of the CAP are very specific, and diverge substantially both in terms of the products concerned and the point of time where they take place. However, inasmuch as the input from national authorities consists on reports or favorable opinions necessary to proceed with the final decision to be taken at the European level.

Structural funds, which include European Regional Development Fund, the European Social Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and the Cohesion Fund, are governed essentially by Regulation 1303/2013<sup>327</sup> although there are more detailed specific rules concerning

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<sup>322</sup> See section 5.2.5.

<sup>323</sup> Article 6 of Regulation 355/77.

<sup>324</sup> Article 13(1).

<sup>325</sup> Articles 14(1) and 22.

<sup>326</sup> Article 13(3).

<sup>327</sup> Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development

each particular instrument. With this in mind, for the sake of simplification, we can describe the arrangements for the management of structural funds in the following way.

Member State authorities are in charge of the individual management and control of the funds. However, competences are distributed among several bodies. As a general rule, there must be a separate managing authority, the certifying authority, where applicable, and the audit authority, each with different duties. Additionally, a monitoring committee can be set up. As the funds are usually related to local or regional competences, those bodies are often designated at the local level, and some private bodies can be awarded some of the functions. Thus, most of the procedure remains at the national or sub-national level, namely the managing of the programme, the relationships with the beneficiaries, the certification of the statements of expenditure, and the subsequent audit thereof.

The Commission holds powers of budget implementation and is ultimately responsible for the efficiency and accountability of the system. It keeps the formal power to award the final payments, all the previous payments being provisional. Commission officials or authorised Commission representatives may carry out on-the-spot audits or checks<sup>328</sup>.

As we will see in the next Chapter, litigation in the field of structural funds on grounds of procedural breaches stemming from the composite nature of the administrative procedures for the awarding of funds has been abundant<sup>329</sup>. Therefore, procedures in the field of the awarding of EU funds are clear examples of composite procedures and they have the advantage that they have been assessed by the European Courts from different perspectives.

Unlike the composite procedures described in the previous chapters, the legal framework governing European structural funds and funds related to the Common Agricultural Policy is more diverse and thus harder to systematise. However, the

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Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, 320–469).

<sup>328</sup> Article 75 of Regulation 1303/2013.

<sup>329</sup> Section 5.2.2.

elements of composite procedures, as well as their legal shortcomings can easily be identified and since these procedures have been in force for a longer time, relevant conclusions can be drawn on how they were assessed by the European courts.

#### *4.4.8.- Protection of geographical indications and designations of origin*

The 'geographical indication' is a type of intellectual property right<sup>330</sup> in the form of a distinctive signs that permit the identification of product whose where quality, reputation or other characteristic is essentially attributable to its geographical origin.

The protection of geographical indications dates back to old national legislations which aimed at the protection against the adulteration of local products that had acquired a considerable reputation. The quality of the produce was thus linked to a geographical location with regard to its climate or its geology<sup>331</sup>. The development of international trade brought about the need for a international system of protection, starting at the end of the 19th Century<sup>332</sup>. The international instruments still constitute the basic international regime of protection together with the rules of the WTO Agreement on trade-related aspects of intellectual property rights<sup>333</sup>. The international system of protection is based on compromise with third countries that have a weaker interest in protection of geographical indications, consequently the European rules, both at the national and EU level, tend to offer a more complete protection<sup>334</sup>.

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<sup>330</sup> Geographical indications are a very special type of intellectual property right with a special legal nature due to the characteristic that they are neither the property of one single or legal person; nor owned by the state. They are an extraordinary example of communal property. Alberto Francisco Ribeiro de Almeida, "The legal nature of geographical indications and designations of origin", 36 *European Intellectual Property review* (2014), 640-52, at 645.

<sup>331</sup> The historical origins of denominations of origin are usually traced back to the medieval French laws conferring protection upon Bordeaux wine producers (*privilège de la barrique*), see Michael Blakeney, *The Protection of Geographical Indications: Law and Practice*, Edward Elgar Publishing (Cheltenham, 2014), at 4.

<sup>332</sup> Notably, the Paris Convention for the Protection of Industrial Property of 1883 awarded special protection for indications of sources and appellations of origin, and were later complemented by the Madrid Agreement on the Indications of Source of 1891 and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958.

<sup>333</sup> Bernard O'Connor, *The Law of Geographical Indications*, Cameron May (London, 2004), at 27. In particular, Articles 22 to 24 of the TRIPS.

<sup>334</sup> Sébastien Vitali, *La protection internationale des indications géographiques : histoire d'un compromis difficile*, Nomos (Baden-Baden, 2007), at 32.

The necessity of a European-wide system of protection of geographical denominations became apparent since the early case-law instituting the principle of equivalence as a pillar of the common market<sup>335</sup>. The reasoning of the Court of Justice was that technical standards could not be used by a Member State to prevent the marketing of goods legally produced in another Member State. Harmonization of geographical designations has been adopted through different regulations<sup>336</sup>, firstly in the area of wines<sup>337</sup>, and then more generally on agricultural products and foodstuffs with Regulation 2081/92<sup>338</sup>, taking into account the existing principles of the protection under national legislation and, sometimes, establishing links with it<sup>339</sup>.

The unfavourable outcomes of WTO disputes relating to the system of protection of Regulation 2081/92 triggered its abrogation and replacement<sup>340</sup> by Regulation 510/2006<sup>341</sup>. The mechanism under Regulation 2081/92 was a central registration system managed by the Commission but in which Member State authorities play a significant role<sup>342</sup>. Today, the legal regime is found in Regulation 1151/2012<sup>343</sup>, that reproduces the same procedures of Regulation 510/2006 while establishing other rules on the quality of agricultural products and foodstuffs. This Regulation sets out

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<sup>335</sup> Notably, the *Cassis de Dijon* ruling; C-120/78 - Rewe v Bundesmonopolverwaltung für Branntwein, [1979] ECR 649. See further O'Connor, *The Law of Geographical Indications...*, at 125.

<sup>336</sup> See in more detail in the development on the EU rules Vadim Mantrov, *EU Law on Indications of Geographical Origin: Theory and Practice*, Springer (Heidelberg, 2014) at 208.

<sup>337</sup> Council Regulation 817/70 of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions (OJ 1970 L 99, 1), Council Regulation (EEC) No 338/79 of 5 February 1979 laying down special provisions relating to quality wines produced in specified regions (OJ 1979 L 54, 48 – 56), Council Regulation 823/87 laying down special provisions relating to quality wines produced in specified regions (OJ 1987 L 84), Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine (OJ 1999 L 179, 1-120).

<sup>338</sup> Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, 1–8).

<sup>339</sup> Caroline Le Goffic, *La protection des indications géographiques : France, Union européenne, Etats-Unis*, Litec (Paris, 2010), at 92. However, there is a number of cases where the compatibility between the European and national systems of protection was disputed, notably, C-3/91, Exportur / LOR and Confiserie du Tech [1992] ECR I-05529; C-325/00, *Commission / Germany* [2002] ECR I-9977, and C-478/07, Budějovický Budvar [2009] ECR I-07721.

<sup>340</sup> Roland Herrmann, and Thilo Marauhn, "The Law and Economics of Geographical Indications: Introduction", 10(1) *Estey Centre Journal of International Law and Trade Policy*, 2009, 12-19, at 15.

<sup>341</sup> Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, 12-25).

<sup>342</sup> Trevor Cook, *EU intellectual property law*, Oxford University Press (Oxford, 2010), at 429.

<sup>343</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, 1–29).

provisions on agricultural products and foodstuffs (excluding wine-sector products) from a defined geographical area. There are two basic categories of geographical indications. A protected designation of origin (PDO) relates to foodstuffs which are produced, processed and prepared in a given geographical area using certain recognized know-how<sup>344</sup>. A protected geographical indication (PGI) relates only to a link with the area in at least one of the stages of production, processing or preparation<sup>345</sup>. The procedure for their registration is essentially the same.

The application shall be submitted by a group of producers or processors to the competent authorities of the Member State<sup>346</sup>, accompanied by certain documents and specifications<sup>347</sup>. The application dossier must be scrutinized by the national authority, in order to check that it fulfills the necessary conditions. As part of the scrutiny, a national opposition procedure must be initiated, by which the application is published and interested parties are given the right to oppose the admissibility of the application<sup>348</sup>.

If the competent authority of the Member State considers that the requirements are met, it shall take a favourable decision and it shall lodge an application dossier with the Commission<sup>349</sup>. The favourable decision shall be public and subject to appeal. Once received, the Commission shall, during a period of six months, scrutinise the application and verify that it is justified and meets the conditions<sup>350</sup>. If it is the case, the application shall be published in the Official Journal and an opposition procedure shall begin for a period of three months. Any legal or natural person may lodge an opposition notice, which shall be forwarded by the Commission to the national authority. In case of opposition, there shall be consultations between the person who lodged the opposition and that applicant.

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<sup>344</sup> Article 5(1).

<sup>345</sup> Article 5(2).

<sup>346</sup> Article 49(1).

<sup>347</sup> Article 8.

<sup>348</sup> Article 49(3).

<sup>349</sup> Article 49(4).

<sup>350</sup> Article 50.

Once the opposition and, eventually, consultation period has expired the Commission shall take a decision on the registration<sup>351</sup>. Such decision must be an implementing decision, which shall be adopted through a comitology examination procedure<sup>352</sup> in case it decides not to register the geographical indication, or decides to register it but that has been opposition. In case it decides to register the indication, it shall adopt the implementing decision without the assistance of the comitology committee, except if there has been no agreement with the opposing party. The procedure for the registration of geographical indications is a clear example of upwards composite procedure with a relatively simple structure, without the intervention of any EU agencies and, in some cases, not even comitology committees. The national bodies have a prominent role, as their decision to lodge the application with the Commission is an obligatory pre-requisite for the registration on which they enjoy certain discretion. Some of the important cases that we will examine in the next chapter with regard to the challenges of composite procedures relate precisely to this field<sup>353</sup>.

#### *4.4.9.- Ecolabels*

A peculiar type of composite procedure is the procedures for awarding European Union ecolabels. The scheme encourages companies to develop environmentally sustainable products and services. Companies can be authorised to tag an EU ecolabel to their products and services as long as they comply with the criteria laid down by the Commission in cooperation with national authorities and relevant stakeholders. The criteria should ensure that selected products and services have a reduced environmental impact throughout their life cycle, from the extraction of raw material through to production, use and disposal. The individual award of an ecolabel follows a composite administrative procedure initiated at the Member State level and, following a decision by the Commission after consultations with other Member States, a contract by the

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<sup>351</sup> Article 52.

<sup>352</sup> Article 57(2).

<sup>353</sup> Case T-114/99, *CSR Pampryl SA / Commission*, [1999] ECR II-3334; C-269/99, *Kühne / Jütro*, [2001] ECR I-9541; T-215/00, *La Conquête / Commission* [2001] ECR II-181; T-381/02, *Confédération générale des producteurs de lait de brebis and des industriels de Roquefort / Commission* [2005] II-5337; T-369/03, *Arizona Chemical and Others / Commission* [2005] ECR II-5839; and Case C-343/07, *Bavaria / Bayerischer Brauerbund*, [2009] ECR I-5491. See further in section 5.3.5.

national department responsible and the applicant on the conditions of the use of the ecolabel.

The idea of voluntarily labelling products and services as environmentally sustainable was developed and implemented in some Member States, notably Germany with the so called Blue Angel (*der Blaue Engel*) as early as 1978, which inspired the European ecolabel<sup>354</sup>. The proliferation of these labels in different Member States led the Commission to realise the importance of harmonising such labels in order to avoid distortion of the Internal Market, while maintaining the national labels<sup>355</sup>, and to the adoption of the first ecolabel Regulation in 1992<sup>356</sup>.

The system proved to be unsuccessful in the first years<sup>357</sup>, with no ecolabels granted from 1992 to 1995<sup>358</sup>, but it was amended by a new Regulation in 2000<sup>359</sup> and later in 2009<sup>360</sup>, resulting in a more useful and efficient system. At present, it has reached considerable acceptance<sup>361</sup> and the scheme enjoys a good reputation<sup>362</sup>.

There are two different phases in the procedure for the issuing of ecolabels. The first is the establishment of the criteria for granting the labels. These criteria are set by the Commission, based on the general requirements laid down in the ecolabel

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<sup>354</sup> Robert Wright, "Implementing voluntary policy instruments: the experience of the EU Ecolabel Award Scheme", in Christoph Knill and Andrea Lenschow (eds), *Implementing EU environmental policy : new directions*, Manchester University Press (Manchester, 2000), 87-115, at 97.

<sup>355</sup> Rüdiger Wurzel, Anthony R. Zito, and Andrew J. Jordan, *Environmental Governance in Europe: A Comparative Analysis of the Use of New Environmental Policy Instruments*, Edward Elgar Publishing (Cheltenham, 2013), at 85.

<sup>356</sup> Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme (OJ 1992 L 99, 1 - 7).

<sup>357</sup> Wurzel, Zito, and Jordan, *Environmental Governance in Europe...*, at 86.

<sup>358</sup> According to the figures available in the Commission's webpage on the ecolabel <http://ec.europa.eu/environment/ecolabel/facts-and-figures.html>, no ecolabels were granted in the first four year of existence of the scheme. Only in 1996 six ecolabels were granted.

<sup>359</sup> Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme (OJ 2000 L 237, 1 - 12).

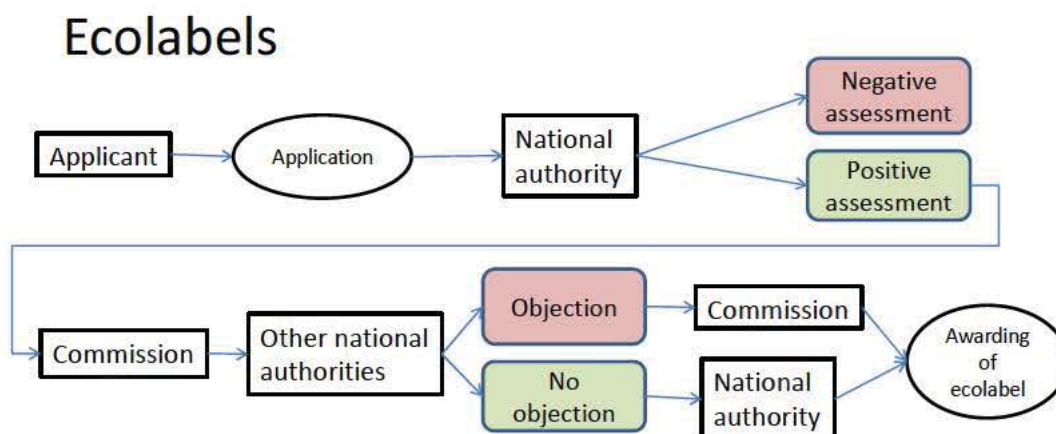
<sup>360</sup> Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ 27 L 2010, 1-17).

<sup>361</sup> Again, according to the Commission's webpage, the figure of products and services that have been awarded an ecolabels amounts to more than 17,000 as of 2012.

<sup>362</sup> Wurzel, Zito, and Jordan, *Environmental Governance in Europe...*, at 87.



Regulation<sup>363</sup>. For this, the Commission is assisted by an EU ecolabeling board, with representatives of all Member States but where other interested parties may participate too<sup>364</sup>. Member States can initiate the development or revision of ecolabel criteria<sup>365</sup>.



Once the criteria have been published in the Official Journal, parties may apply for an EU ecolabel at the designated authority of the Member State. The national authorities must carry out an assessment. They also must consult a special register and inform the Commission of the decisions they intend to make, so the Commission conveys the information on to the other national bodies, which can present reasoned objections. If the objections cannot be disposed of by way of informal consultation, the Commission has the power to take a decision. When the decision is made by the national administration, or by the Commission in case of opposition, to award the

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<sup>363</sup> Article 6 of Regulation 66/2010.

<sup>364</sup> Article 5 of Regulation 66/2010 and Commission Decision 2010/709/EU of 22 November 2010 establishing the European Union Ecolabelling Board (notified under document C(2010) 7961).

<sup>365</sup> Article 7.

ecolabel, the national authority shall draw up a contract with the applicant regarding the eco-label's conditions for use<sup>366</sup>.

To a certain extent, this procedure is less formalised than some previous ones. This is logical considering the licence to use an ecolabel is merely voluntary, and does not have the same legal effects that binding authorisations. However, again the clear interactions of national and European authorities in an administrative sequence can clearly be distinguished. Because the procedure ends with an act of the national authorities, a contract to be concluded with the applicant, this procedure can be qualified as top down procedure<sup>367</sup>.n

#### *4.4.9.- Procedures in the area of freedom, security and justice. Comparison of fingerprints relating to asylum and other international protection procedures*

The area of freedom, justice and security, formerly referred to as Justice and Home Affairs<sup>368</sup>, has traditionally been prone to compromises between the reluctance of Member States to yield competences and the need to find a response to questions that have an essentially European dimension.

Hence, cooperation among national authorities with limited involvement of the Institutions remain a frequent scheme. However, in the field of asylum and immigration the European Union has experience an exponential growth of competences. Although

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<sup>366</sup> Article 9.

<sup>367</sup> Della Cannanea, "Mixed administrative proceedings...", at 199.

<sup>368</sup> Police and Justice cooperation was formally introduced in the Maastricht Treaty which established Justice and Home Affairs (JHA) as one of the EU's 'three pillars'. The Justice and Home Affairs pillar was organised following an intergovernmental rationale with barely any involvement of the EC institutions. The name 'area of freedom, security and justice' was introduced by the Treaty of Amsterdam which stated that the EU shall "maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". The Treaty of Amsterdam also transferred the areas of asylum, immigration and judicial cooperation in civil matters to the Community pillar, the remainder being renamed Police and Judicial Co-operation in Criminal Matters. The 2009 Treaty of Lisbon abolished the pillar structure, although still many special rules apply. Simultaneously, the Charter of Fundamental Rights also gained legal force and Europol was brought within the EU's legal framework. See for a brief overview, Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford University Press (Oxford, 2010), at 332-36; and Anneliese Baldaccini and Helen Toner, "From Amsterdam and Tampere to The Hague: An Overview of Five Years of EC Immigration and Asylum Law", in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing (Oxford, 2007), 1-22.

European Union law has already become the centrepiece of legislation in the matter<sup>369</sup>, procedures remain essentially national. However, recent developments bring about a reinforced cooperation that goes further than a mere exchange of information between national authorities.

The current legal framework consists of a set of acts passed on the same date, out of which a Directive on "procedure"<sup>370</sup>, a Directive on "standards for reception of applicants"<sup>371</sup>, a Regulation on "Member State responsible"<sup>372</sup>, and a Regulation on "eurodac"<sup>373</sup>. Apart from setting common rules for the national administrative procedures, it is noteworthy that a central database has been set up to gather all the information that national systems can collect and forward that information to the national authorities who shall then make the relevant decisions.

This central database regulated under Regulation 603/2013 is not only a source of information for national authorities dealing with asylum or other international protection procedures, but it has an active role and it is interlinked with the national police services. Member State authorities are obliged to promptly take the fingerprints of every applicant and immediately transmit it to the Central System<sup>374</sup>, together with certain other information.

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<sup>369</sup> Steve Peers, Elspeth Guild, Jonathan Tomkin, Diego Acosta Arcarazo, Kees Groenendijk, and Violeta Moreno-Lax, *EU Immigration and Asylum Law*, Martinus Nijhoff Publishers (Leiden, 2013), at 5.

<sup>370</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, 60–95).

<sup>371</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 80, 96–116).

<sup>372</sup> Following the precedent of the Dublin conventions, the main criterion is the country where the applicant first crossed the border. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, 31–59).

<sup>373</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, 1–30).

<sup>374</sup> Article 9 of Regulation 603/2013. There is a limited exception to this general rule, like minors under 14 years of age or special circumstances related to health protection.

The Central System holds the data<sup>375</sup> stemming from all national authorities for ten years<sup>376</sup>, making it accessible to national authorities<sup>377</sup> and to Europol<sup>378</sup>. Notably, the fingerprint database allows for a quick contrast of all data available and thus for law enforcement and fraud prevention purposes. The rules are established in a way that Member States rely in the information provided by the Central System to make their decision in the national administrative procedure, but the combination of the rules of the other aforementioned instruments lead to a specific decision.

Thus, for example, national authorities will end the procedure for granting asylum as soon as they receive the information that there was an entry to another Member State before, in which case the procedure shall be dealt with in that first country, according to Regulation 604/2013<sup>379</sup>, and the Member State where the application is being submitted shall be declared inadmissible, in accordance with Directive 32/2013/EU<sup>380</sup>. What is important for the definition of composite procedures is the fact that based on the communication received by the Central System, Member States shall take a particular decision, that is, it is not a mere transmission of information that the national authorities might assess with a margin of appreciation.

Considering the recent evolution, the area of freedom, security and justice is likely to see a proliferation of composite procedures, with larger Union's powers than at present.

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<sup>375</sup> According to Article 11 of Regulation 603/2013, this data consist on: (a) fingerprint data; (b) Member State of origin, place and date of the application for international protection; in the cases referred to in Article 10(b), the date of application shall be the one entered by the Member State who transferred the applicant; (c) sex; (d) reference number used by the Member State of origin; (e) date on which the fingerprints were taken; (f) date on which the data were transmitted to the Central System; (g) operator user ID; (h) where applicable in accordance with Article 10(a) or (b), the date of the arrival of the person concerned after a successful transfer; (i) where applicable in accordance with Article 10(c), the date when the person concerned left the territory of the Member States; (j) where applicable in accordance with Article 10(d), the date when the person concerned left or was removed from the territory of the Member States; (k) where applicable in accordance with Article 10(e), the date when the decision to examine the application was taken.

<sup>376</sup> Article 12 of Regulation 603/2013.

<sup>377</sup> Article 20 of Regulation 603/2013.

<sup>378</sup> Article 21 of Regulation 603/2013.

<sup>379</sup> Article 13 of Regulation 604/2013.

<sup>380</sup> Article 33 of Directive 32/2013/EU.

#### 4.4.10.- Trade of endangered species of wild flora and fauna

International trade of endangered species has been protected by an international instrument since 1975 the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>381</sup>, of which all EU Member States are signatories. Within the European Union, Regulation 338/97<sup>382</sup> (the CITES Regulation) entailed a compromise between the need to regulate the international trade in endangered species and the need to respect free movement of goods<sup>383</sup>.

The annexes of Regulation 338/97 list a number of species that fall under the scope of protection. Any holder of a specimen of such species wanting to use it for commercial purposes shall apply for a single licence. The procedure in this case is carried out by national authorities on the conditions laid down by the Regulation, that is, in particular, certain requirements for the breeder of the specimen<sup>384</sup>, as well as a certificate demonstrating its legal origin<sup>385</sup>. A similar mechanism works for the import of such specimens, but in this case the national authorities shall seek scientific advice as to the prospective impact in the environment of the imported species<sup>386</sup>. However, if the port of import is not located in the country of destination, they shall recognize the authorisation granted by the Member State of destination<sup>387</sup>.

Member States shall reject the application if the requirements laid down in Regulation 338/97 are not met<sup>388</sup>. Even if all the conditions are fulfilled, national authorities might still decline the authorisation following the advice of the scientific

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<sup>381</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed at Washington, D.C., on 3 March 1973 and amended at Bonn, on 22 June 1979.

<sup>382</sup> Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ 1997 L 61, 1–69).

<sup>383</sup> Andrea M. Keessen, *European Administrative Decisions. How the EU regulates products in the internal market*, Europa Law Publishing (Groeningen, 2009), at 21.

<sup>384</sup> Article 8(3) and 10, further elaborated by Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (OJ 166 L 2006, 1-69).

<sup>385</sup> Article 9.

<sup>386</sup> Article 19.

<sup>387</sup> Article 12.

<sup>388</sup> Article 4.

authority; however, it is not allowed to take national safeguard measures, only the Commission can impose a trading ban relating to certain countries or species.

As a result, even if the criteria are the same for all Member States the possibility exists that some national authorities take a stricter stance than others for authorisations that have a legal effect in all Member States. Several measures are foreseen in order to mitigate this possible discrepancy, discouraging operations to intentionally choose one Member State over the other, or to go to try a second application with the same scope to another Member State<sup>389</sup>. First, in cases of rejections in case which are significantly relevant to the objectives of the Regulation, the Member State shall inform the Commission, which shall in its turn inform the other Member States so as to ensure the uniform application of the Regulation<sup>390</sup>. Secondly, it is mandatory for the applicant to inform of previous rejections. Lastly, previous rejections by other Member States shall be recognized and only when circumstances have changed significantly or when new evidence to support the application has become available may the other Member States adopt a different position<sup>391</sup>.

Although the Regulation is aimed at a single authorisation under the competence of national authorities, one Member State can put one authorisation issued by another Member State into question and declare it void after consultation the issuing Member State. If disagreement persists after consultation, the declaration will only be unilateral and the issuing Member State is not obliged to revoke it. There is no settlement procedure where the Commission can eventually take a final decision. The only possibility would be that the Commission launches an infringement procedure against the Member States that is following an unreasonable interpretation of the requirements<sup>392</sup>.

The composite element exists only in case of dispute, when the Commission is called into play, but even in this case its decision is not final. This procedure is at the borderline of the notion of composite procedures, because the input from the EU is not

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<sup>389</sup> Keessen, *European Administrative Decisions...*, at 61 and 62.

<sup>390</sup> Article 6(2).

<sup>391</sup> Article 6(4)(a).

<sup>392</sup> Keessen, *European Administrative Decisions...*, at 61 and 62.



binding. However, the structure of the procedure provides evidence that the role of other Member States and the Commission is not negligible. This is also an interesting example because it proves that procedures with slight composite elements can actually be very detrimental to the coherence of the systems and lead, perhaps even more intensely than with composite procedures in the strict sense, to serious shortcomings for judicial review and in general individual protection<sup>393</sup>.

#### **4.5.- Conclusions**

Composite procedures are the procedural manifestation of the increasingly intense cooperation taking place between the national and European public administration. Legal academia has come into terms with the existence of a category of administrative procedure which goes beyond the classic dichotomy direct-indirect implementation and that has become more and more common. Yet the legal characteristics of this category, composite procedures, are hard to define in a conclusive and comprehensive way.

The gist of composite procedures is that actors from both the European and national level of administration provide a relevant input to an administrative procedure which ends by the adoption of a decision by one of them, with regard to the implementation of EU law. This is the basic definition that combines comprehensiveness and accuracy. It is worth noting that some of the examples that are considered composite procedures fit better than others in this definition.

Taking a look at the origins of composite procedures we discover that they were born out of practical necessity, as a compromise between yielding implementing competences to the European level of administration and keeping Member States involved in the execution of EU law, thus respecting their procedural autonomy. It is only logical that this fragmentation at origin implied a lack of a common legal framework, and thus a complicated academic elaboration before analysing the challenges they entail.

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<sup>393</sup> *Ibid.*



The criticism shall not be addressed at composite procedures themselves, but at the lack of legal solutions to the problems they bring about, in terms mainly of access to justice and procedural rights. On the contrary, composite procedures appear as pragmatic solutions with positive results for European integration. The expansion of composite procedures provides evidence of its success, for a number of reasons. Firstly, they have facilitated expansion of the EU administrative action to areas which member States would otherwise have kept away from European intervention. Secondly, they have provided the necessary information flow and technical expertise for common decision-making mechanisms in highly specialised areas. Thirdly, they have helped to create a network of mutual confidence where implementation and enforcement are more effective. Fourthly, they gather inputs from different actors, even outside of the EU and national realms, enabling for wider participation and pluralism. Lastly, the structures and settings are adaptable to the permanent state of change and development of areas covered by their action.

A common legal framework, notably in the form of certain rules to be included in the regulation on a common European administrative procedure, would contribute to meet the challenges composite procedures bring about and which would be analysed at length in the following chapter.



## CHAPTER 5

### Legal challenges triggered by composite procedures

- 5.1.- Preliminary remarks
- 5.2.- The right to be heard in composite procedures
  - 5.2.1.- *The right to be heard in the EU and in Member States*
  - 5.2.2.- *Evolution of the case-law concerning the recovery of structural funds.*
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- 5.3.- The obligation to state reasons
  - 5.3.1.- *The right to a reasoned decision as a citizen's right under EU law*
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- 5.3.- The right to judicial review in composite procedures
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  - 5.3.3.- *The right to judicial review according to the Court of Justice*
    - Direct challenge: action for annulment*
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  - 5.3.4.- *Composite procedures and judicial review: identifying the lacunae*
    - (A) *First gap: determining the competent court*
    - (B) *Second gap: what acts can be reviewed?*
    - (C) *Third gap: standing to sue*
- 5.4.- Conclusions

### **5.1.- Preliminary remarks**

Composite procedures are mechanisms of intricate legal complexity that has emerged out of practical necessities and political compromises. In these circumstances, composite procedures bring about serious legal challenges. The legal position of individuals *vis-à-vis* the different public administrations that take part in the administrative procedure remains unclear. At times, the individual lacks the essential procedural rights that would be evident in the case of a 'normal' administrative procedure. The lack of clarity leads to situations where the individual, finding himself in a complex system of procedural arrangements, cannot effectively invoke or exercise his rights. When confronted with these cases, the Court of Justice reasons on a case-by-case basis, without seeing composite procedures as a peculiar phenomenon on its own, leading to a lack comprehensive solutions. At times, responsibility is yielded to the national courts, which are in practice unable to review the whole procedure. In many cases, the approach of the Court of Justice is the only one capable of complying with the respect for national jurisdictions, but it fails to secure individual rights at stake convincingly.

The analysis and systematisation of composite procedures is pertinent because the solution to the challenges they entail presupposes the need of a coherent legal category. Once established, specific mechanisms apply to cope with its peculiarities. These peculiarities cannot, as we will see, be solved satisfactorily with the currently existing legal tools alone. The challenges of composite procedures do not only raise in theory, they have appeared in practice and the legal response for them has been largely insufficient. With the current proliferation of composite procedures, there is a risk that they appear more and more often.

As discussed in the third Chapter, administrative procedures are sequences whereby public authorities take decisions or enact rules respecting and ensuring certain rights of the citizens. Composite procedures entail a fundamental mutation in the nature of administrative procedures, because the responsibility does not lie within a single legal entity, but within several bodies. This feature affects dramatically the procedural rights of the citizens. The relevance of a profound legal analysis of composite procedures is not a mere theoretical exercise, it is much needed precisely

because the EU judges have lacked a systematic approach to these problems. The relevance lies with the fact that the present fragmentary situation is unsatisfactory; procedural rights may be breached and the subsequent right to review decisions before a judicial authority brings about so many shortcomings that at times one can see that the right to effective access to justice is not respected.

The objective of this Chapter is to identify these challenges. Considering the rulings issued by the Court of Justice and the GC so far and the many examples of composite procedures described in the previous Chapter, the structure results from the three basic challenges that can be identified, the first two concerning two procedural rights, the right to be heard during the administrative procedure and the right to a reasoned decisions, and the last one related to the most important right once the administrative decision has been taken, namely, the right to its judicial review. This does not mean that these are the only rights at stake. There are some others where one could identify shortcomings related to the phenomenon of composite procedures, such as the right to access one's file and the right to a compensation in case of liability of the administration<sup>1</sup>.

For each section, there will be an analysis of each of the rights in the specific context of composite procedures followed by the assessment of the existing case law of the EU courts for each of them. This structure shall not be an obstacle for the important consideration that the shortcomings are very often related to one another and result, overall, in an unacceptable weakening of the legal position of the individual when affected by composite procedures.

## ***5.2.- The right to be heard in composite procedures***

### ***5.2.1.- The right to be heard in the EU and in Member States***

The right to be heard is one of the main procedural rights that citizens have during the administrative procedure. It is among the administrative rights of defence

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<sup>1</sup> These two however will not be analysed autonomously as one could link them to one of the sections covered; the right to be heard and the duty to reason the decision are intimately linked to the right to access one's file; while the right to sue for damages is connected to the right to access to justice and the determination of the competent judge, as well as the liable administration.

or, in the Anglo-Saxon terminology, a right under the concept of the *due process of law*. The right to be heard is a procedural law as aged as the oldest legal system in the Western world. It is a right existent in ancient Roman law that was famously elaborated by Seneca in *Medea* with the quote:

*Qui statuit aliquid, parte inaudita altera, aequum licet statuerit, haud æquus fuerit.*<sup>2</sup>

The old component of "*audi alteram partem*" was an essential element for a fair trial in the sense of respect for the principle of contradiction in a judicial proceeding. When administrative procedures began to be considered as procedures in which citizens had certain rights<sup>3</sup>, this right was immediately adopted as part of the elementary procedural rights before the public administration<sup>4</sup>. Additionally, this right has been conceived from the standpoint of human dignity that an individual should take part in decisions relating to him or her<sup>5</sup>.

In England, for example, the application of this principle before public authorities can be identified in a judicial ruling as far back as the mid-19th Century, where a judge stated that "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature"<sup>6</sup>, a stance which notoriously resembles that of the Court of Justice of the EU a century later, as we will see afterwards.

Nevertheless, even if this right was originally 'transposed' from judicial procedures to administrative procedures, the scope and legal protection of this right

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<sup>2</sup> He who decides a case without hearing the other side, though he decide justly, cannot be considered just. Seneca, *Medea*, CXCI cited in William Wade and Christopher Forsyth, *Administrative Law*, Oxford University Press (Oxford, 2009), at 403.

<sup>3</sup> See section 3.2.3.

<sup>4</sup> Servulo Correia, "Administrative Due or Fair Process: Different Paths in the Evolutionary Formation of a Global Principle and a Global Right", in Gordon Anthony, Jean-Bernard Auby, John Morison, and Tom Zwart (eds.), *Values in Global Administrative Law*, Hart Publishing (Oxford, 2011), 313-62, at 326.

<sup>5</sup> *Ibid.* at 327.

<sup>6</sup> Stanley Alexander de Smith, *Judicial Review of Administrative Action*, Stevens (London, 1973) at 134, citing the judgment of judge Byles J. in *Cooper v Wandsworth Board of Works* (1863) 14 C.B.N.S. 180.

are not exactly comparable. As a procedural right before the courts, the right to be heard is normally considered a fundamental right integrating the right to a fair trial<sup>7</sup>. Some Constitutions, like the Spanish Constitution, enshrines this right in administrative procedures too, although not with the category of a fundamental right<sup>8</sup>. The example of the maximum level of protection in the EU is Greece, where the Constitution equals the protection of the right to a hearing in an administrative procedure to that before the Courts<sup>9</sup>.

Within the broader European context, the right to a hearing is enacted as part of the right to a fair trial provided for in Article 6 of the ECHR. This human right concerns criminal procedures before a court, yet an array of administrative procedures can be included under the scope of this right. The ECtHR has held that some punitive administrative procedures can be assimilated to 'criminal' procedures within the meaning of Article 6 ECHR<sup>10</sup>, and that, if these administrative procedures did not offer the safeguards of Article 6 ECHR, then the courts must have the power to rehear the evidence<sup>11</sup>. The debate on the applicability of some of the guarantees of Article 6 ECHR, in particular a proper right to a hearing, has been particularly intense in the field of EU competition law<sup>12</sup>. However, the guarantees of the Convention would not apply to all administrative procedures, but only to a particular kind (sanctioning

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<sup>7</sup> For example, Article 103(1) of the German Constitution 1949; "In the courts every person shall be entitled to a hearing in accordance with law"; or Article 45(1) of the Constitution of Poland of 1997: "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court";

<sup>8</sup> Article 105 of the Spanish Constitution of 1978 reads: "The law shall make provision for:

...

c) The procedures for the taking of administrative action, with due safeguards for the hearing of interested parties when appropriate."

It is worth noting that this provision is not located within the list of fundamental rights in Part I of the Constitution.

<sup>9</sup> Article 20 of the Greek Constitution of 1975:

"1. Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law.

2. The right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests."

<sup>10</sup> *La Compte, Van Leuven and De Meyere / Belgium*, Appl. no. 6878/75 and 7238/75, A/43 para 51; and *Ozturk / Germany*, A/73 (1984) 6 EHRR 409.

<sup>11</sup> *Tsfayo / United Kingdom*, App. No 60860/00, All ER (D) 177 (Nov), para 48.

<sup>12</sup> Nicolo Zingales, "The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?", 7(1) *Competition Law Review*, 129-56, at 129.



procedures), for this reason the relevance of Article 6 ECHR for our purposes in this respect is limited.

In the context of the European Union, the right to be heard is now explicitly included in the Charter of Fundamental Rights of the EU as part of the right to a good administration. Article 41 ChFR provides for the "right of every person to be heard, before any individual measure which would affect him or her adversely is taken".

This right had previously been recognised by the Court of Justice very early as an essential procedural right which applied even in the absence of specific rules concerning the procedure in particular<sup>13</sup>, or any other general provision in EU law but drawing inspiration from national legal systems<sup>14</sup>. The Court called the right to be heard a fundamental principle of Community law<sup>15</sup>. Later, the Court included it as part of a right to a good administration, deemed by its case-law as a general principle of law<sup>16</sup>. The wording of Article 41 results from judgements of the Court of Justice<sup>17</sup>.

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<sup>13</sup> The ruling of the Court of Justice on the right to be heard dates back from 1963. C-32/62, *Alvis / Council* [1963] ECR 49 (English special edition). It elaborated on this right later in cases 17/74, *Transocean Marine Paint Association / Commission* [1974] ECR 1063; 85/76, *Hoffmann-La Roche / Commission* [1979] ECR 461, at paragraph 9; 234/84 *Belgium / Commission* [1986] ECR 2263, at paragraph 27; 301/87 *France / Commission* ("Boussac Saint Frères") [1990] ECR I-307, at paragraph 29; C-238/99 P, *Limburgse Vinyl Maatschappij / Commission* [2002] ECR I-8375, at paragraph 85; C-382/99, *Netherlands / Commission* [2002] ECR I-5163, at paragraph 49; Case T-189/02, *Ente per le Ville vesuviane / Commission* [2007] ECR II-89, at paragraph 88; and Case T-170/06, *Alrosa Company Ltd / Commission* [2007] ECR II-2601, at paragraph 91.

<sup>14</sup> Advocate General Warner is eloquent in his description of the national systems which generally included this right. In the Opinion delivered on 19 September 1974 in 17/74, *Transocean Marine Paint Association / Commission* [1974] ECR 1082 he states: "There is a rule embedded in the law of some of our countries that an administrative authority, before wielding a statutory power to the detriment of a particular person, must in general hear what that person has to say about the matter, even if the statute does not expressly require it. *Audi alteram partem* or, as it is sometimes expressed, *audiatur et altera pars*." For a detail reference of the legal protection of the right to be heard in Member States see Sabrina Nöhmer, *Das Recht auf Anhörung im europäischen Verwaltungsverfahren*, Mohr Siebeck (Tübingen, 2013), at 79.

<sup>15</sup> Joined Cases C-48/90 and C-66/90 *Netherlands and Others / Commission* [1992] ECR I-565, at paragraph 44, Case C-135/92 *Fiskano / Commission* [1994] ECR I-2885, at paragraph 39, and Case C-32/95 P *Commission / Lisrestal and Others* [1996] ECR I-5373, at paragraph 21.

<sup>16</sup> Case C-255/90 P, *Burban* [1992] ECR I-2253, and Court of First Instance in Case T-167/94 *Nölle* [1995] ECR II-2589; and, more explicitly in Case T-54/99, *max.mobil / Commission*, [2002] ECR II-313, at paragraph 48. See further Miguel Antonio Guevara Quintanilla, *El derecho a la buena administración*, Publicaciones de la Universidad Complutense (Madrid, 2010), at 135.

<sup>17</sup> Among others, Case 222/86 *Heylens* [1987] ECR 4097; Case 374/87 *Orkem* [1989] ECR 3283; C-269/90 *TU München / Hauptzollamt München-Mitte* [1991] ECR I-5469.

All these general considerations are important for composite procedures, because as we have specified at length in the previous Chapter, there are no general provisions for composite procedures. It is unquestionable that the right exists with the category of fundamental right, not only regarding the individual *vis-à-vis* the European administration but also to Member States' administrations when implementing EU law<sup>18</sup>.

The peculiarity of composite procedures lies on the fact that several authorities participate in the decision making process, which implies that this right could potentially be exercised before different bodies. The essence of this right might be at stake if the hearing does not take place before the relevant level of administration.

There is a clear evolution of the case-law of the Court of Justice and the Court of First Instance on the extent to which the right to be heard is guaranteed in composite procedures, and specially, before what administration can this right be exercised. However, there is a very fragmentary approach, and the European courts fail to see the connection between some of the cases, perhaps because the notion of composite procedures is not accepted as a general category. For this reason, it is illuminating to structure the evolution of the case-law in three different subject-matters.

#### *5.2.2.- Evolution of the case-law concerning the recovery of structural funds.*

The first emblematic case of the judicial assessment of the right to be heard in the context of composite procedures is *Lisrestal*<sup>19</sup>, one of the often cited cases where the CFI acknowledges that the right to be heard is a fundamental principle of Community law<sup>20</sup>.

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<sup>18</sup> According to Article 51 of the Charter: "The provisions of this Charter are addressed to the Institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law."

<sup>19</sup> Case T-450/93, *Lisrestal and others / Commission* [1994] ECR II-1180.

<sup>20</sup> *Ibid.* at paragraph 42.

The case concerns several applicants of financial aid under the European Social Fund. Pursuant to the applicable rules at the time<sup>21</sup>, the application for funds was submitted to the competent authority in Portugal and it was followed by payment by the ESF of an advance of 50% of the assistance approved on the date on which the operations concerning vocational training of young people were scheduled to begin. Upon the end of the activities, the ESF reviewed the file and, after the visit of ESF's inspectors to the premises of the applicants, found that some of the funds had been used for ineligible expenditure. As a result, the Commission considered that some of the funds would have to be repaid, and notified in that sense the Portuguese authority acting as intermediaries. The Portuguese authorities were asked for their observations but, without giving notice to the concerned parties, informed the ESF that they did not have any observations to make. Once the Commission issued the decision to reduce the assistance granted, the Portuguese authorities informed the applicants and ordered the recovery<sup>22</sup>. In these circumstances, it was a paradigmatic case where the applicants had not been given the opportunity to make their views heard before an unfavourable decision was made relating to them.

The CFI took the view that the applicants were directly affected by the economic consequences of the decision to reduce the assistance, which adversely affected them, so the fact that they were not given the chance to express their position during the administrative procedure was deemed a procedural breach that led to the annulment of the decision<sup>23</sup>. Nevertheless, the CFI acknowledged that the applicable rules established that the Member State was the sole interlocutor of the ESF *vis-à-vis* the applicants<sup>24</sup>, even though national authorities lacked any power to make its own assessment<sup>25</sup>. Despite that role of mere interlocutor the CFI stated that:

"the Commission, which alone assumes legal liability to the applicants for the contested decision, was not entitled to adopt the contested decision without

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<sup>21</sup> Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516 (OJ 1983 L 289, 1), and Council Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund (OJ 1983 L 289, 38).

<sup>22</sup> Case T-450/93 ... at paragraphs 1-28.

<sup>23</sup> *Ibid.* at paragraphs 48 and 50.

<sup>24</sup> *Ibid.* at paragraph 43.

<sup>25</sup> *Ibid.* at paragraph 44.

first giving those undertakings the possibility, or ensuring that they had had the possibility, of effectively setting forth their views on the proposed reduction in assistance."<sup>26</sup>

This conclusion implies that the right to be heard could have validly taken place before the national authorities, even though they did not enjoy any discretion to decide on the recovery<sup>27</sup>. This viewpoint was later endorsed by the Court of Justice on appeal. However, the ruling of the Court of Justice provided fewer details on the mechanism that would have been deemed acceptable and it did not specify whether the right to be heard could take place at the national or at the EC level<sup>28</sup>.

The hypothetical statement of the CFI in *Lisrestal* materialised in practice in the later case *Mediocruso*<sup>29</sup>. The facts in this case are similar, as it also concerns the recovery of the initial payment stemming from the ESF made to Portuguese applicants. However, in this case, the applicants were heard by the Portuguese authorities with regard to the circumstances that motivated the reduction of the aid<sup>30</sup>. Even then, there were circumstances in the case indicating that the right could have been infringed, such as the short time the applicants were given to comment on certain relevant documents or the fact that the national authorities did not forward to the Commission all of their observations. In spite of that, the CFI accepted that the right to be heard was ensured by the national administration on behalf of the Commission<sup>31</sup>. It is worth noting that the CFI specifies the validity of its previous statement in *Lisrestal* because it was not criticised on that point by the Court of Justice on appeal<sup>32</sup>.

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<sup>26</sup> *Ibid.* at paragraph 49.

<sup>27</sup> Giacinto della Cananea, "Il diritto di difesa e il controllo giurisdizionale", in Sabino Cassese (ed.), *Corso di Diritto Amministrativo. Vol. 6*, Giuffrè Editore (Milan, 2006), 217-31, at 219.

<sup>28</sup> Case C32/95 P, *Commission / Lisrestal and others* [1996] ECR I-5393, there is likewise no assessment of paragraph 49 of the ruling of the CFI in the Opinion of Advocate General La Pergola on that case.

<sup>29</sup> Joined Cases T-180/96 and 181/96, *Mediocruso / Commission* [1998] ECR II-3477.

<sup>30</sup> *Ibid.* at paragraph 51.

<sup>31</sup> Christina Eckes and Joana Mendes, "The Right to be Heard in Composite Administrative Procedures: Lost in between Protection?", 36 *European Law Review*, (2011), 651-70, at 660.

<sup>32</sup> Joined Cases T-180/96 and 181/96 ... at paragraph 50.

This time, the Court of Justice quashed the ruling of the CFI<sup>33</sup>, but it was not because the hearing took place at the national level but rather because no reasonable period was granted to it between the time at which it was able to examine the reports and the time at which it had to express its view<sup>34</sup>.

This understanding of the right to be heard would entail limitations in the right of defence, as it appeared more evidently in the case *Vlaams Fonds*<sup>35</sup>. In this case, the beneficiary of aid stemming from ESF had been heard by the Belgian authorities dealing with the funds. However, it was only after the national authorities forwarded the applicant's comments to the Commission that some relevant documents were drawn up, thus effectively preventing the concerned party to comment on that<sup>36</sup>.

The CFI thus annulled the decision. Although it did not follow from the CFI's argument that the right to a hearing is best guaranteed if it takes place at the level where the decision is made, it would be a better solution for cases where new documents can appear partially depriving the concerned party of his or her right to be heard.

A similar line of argument is followed concerning Regional Development Funds. In *Ville vesuviane*<sup>37</sup> the CFI assessed the situation where a recipient of RDF is adversely affected by a decision of the Commission. According to the rules governing the RDF<sup>38</sup>, national authorities act as the sole interlocutor. The CFI considered that the rights of the applicant are protected inasmuch as it could have submitted its observations to the relevant Italian authorities, even if not expressly asked to do so<sup>39</sup>. Moreover, it finds that the observations could not possibly have changed the outcome

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<sup>33</sup> Case C-462/98 P, *Mediocruso / Commission* [2000] ECR I-7183.

<sup>34</sup> *Ibid.* at paragraph 38.

<sup>35</sup> Case T-102/00, *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap / Commission* [2003] ECR II-2433.

<sup>36</sup> *Ibid.* at paragraph 83.

<sup>37</sup> Case T-189/02, *Ville vesuviane / Commission* [2007] ECR II-89.

<sup>38</sup> At the time, Council Regulation (EEC) 1787/84 of 19 June 1984, of the European Regional Development Fund (OJ 1984 L 169, 1).

<sup>39</sup> Case T-189/02 ... at paragraph 94.

of the procedure, so it ruled out any breach in the rights of defence<sup>40</sup>. The appeal by the applicant was unsuccessful<sup>41</sup>.

A recent ruling of the CFI confirms that the case-law remains unchanged. In *Cofac*<sup>42</sup> an applicant that had requested the allocation of funds pertaining to the ESF. The Commission decided to reduce the amount of funds to be transferred of funds due to some doubts concerning certain formative actions<sup>43</sup>. The applicant argued that the right to be heard should have taken place before the Commission and not before the national administration, as it happened. This would be still more relevant considering some related proceedings took place after the applicant submitted the observations to the Portuguese body in charge. The Court assessed whether or not the circumstances happening after the applicant commented on her file had really had an impact on the decision taken, so as to avoid an infringement like the one in *Vlaams fonds*. Since it concluded they had not, the CFI dismissed the action<sup>44</sup>. It therefore confirmed that there is no need that the comments are submitted to the Commission.

Consequently, the following conclusions can be drawn from the case-law of the European courts concerning structural funds. First, as a starting point, the right to be heard must be respected even if not expressly provided by the applicable rules. Second, however, it is not mandatory that this right be exercised before the body that makes the decision, *i. e.* in this case the Commission. As the rules concerning structural funds indicate that the national authorities are the only point of contact with the beneficiaries, it is acceptable that the eventual observations of the parties are submitted before the Member State and then forwarded to the Commission. In this case, the CFI and the Court of Justice accept that the right to be heard is guaranteed 'on behalf of' the Commission. Lastly, if there are relevant facts or documents appearing after the observations have been submitted, as happened in *Vlaams Fonds*, the concerned party needs to be given the opportunity to comment on them, but this can be done again by the national authorities. As we will see, this position of the

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<sup>40</sup> *Ibid.* at paragraph 98.

<sup>41</sup> Joined Cases C-445/07 P and C-455/07 P, *Ville vesuviane / Commission* [2009] ECR I-7993.

<sup>42</sup> Case T-158/07, *Cofac / Commission* [2009] ECR II-237.

<sup>43</sup> *Ibid.* at paragraph 98.

<sup>44</sup> *Ibid.* at paragraph 41.

Courts is different from the case-law regarding the repayment of import duties, where there is an evolution towards a more protective view of the rights of defence.

### *5.2.3.- Evolution of the case-law of the CFI on the repayment of import duties*

Before the creation of the Court of First Instance, the Court of Justice ruled on several cases concerning the repayment of import duties. In those cases the applicants would complain that they were entitled to reduced import duties which the Commission, in the application of the old Community Customs rules<sup>45</sup>, had denied.

The scheme laid down in these old rules was that the concerned party could request a remission of the duties paid in special circumstances duly justified, but that it would be the national authorities whom individual could contact, although the Commission would enjoy the discretion to decide. That scheme implied that the individual did not have the right to be heard by the Commission.

The scheme was ruled acceptable by the Court of Justice in various occasions. In *Control Data*<sup>46</sup> the applicants, who claimed an exemption of import duties for a scientific apparatus<sup>47</sup>, criticized that the procedural practice did not permit either an exchange of opinions or allow the parties concerned to give their views on any matters at issue or even give them the opportunity to provide additional explanations before the decision was taken<sup>48</sup>.

The Court of Justice dismissed those arguments by acknowledging that the Commission followed the procedure laid down by the relevant Community rules. This procedure enabled the applicant to state in full its arguments concerning nature of the imported goods with the Belgian authorities and that the file was later made available

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<sup>45</sup> In particular Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 175 , 1)

<sup>46</sup> Case 294/81, *Control Data Belgium NV SA / Commission* [1983] ECR 911.

<sup>47</sup> Based on Regulation ( EEC ) No 1798/75 of the Council of 10 July 1975 on the importation free of Common Customs Tariff duties of educational , scientific or cultural materials (OJ, 1975 L 184 , 1).

<sup>48</sup> *Ibid.* at paragraph 16.



to the Commission<sup>49</sup>, and such arrangement was considered respectful of the rights of defence of the applicant by the Court of Justice.

In *Van Gend en Loos and Bosman*<sup>50</sup> (not to be confused with the famous *Van Gend en Loos* 26/62 twenty years before) the Court of Justice again acknowledged that the procedure set up in the applicable rules was followed and that "that procedure allowed the applicants to put forward all their arguments to the Netherlands authorities. All the documents on the file were available both to the committee on duty-free arrangements and to the Commission. In those circumstances, the complaint based on a breach of the procedural requirements was dismissed."<sup>51</sup>

The last case heard on first instance by the Court of Justice was *CT Control*<sup>52</sup>. The Court of Justice was more descriptive in stating that the "procedure for adopting the disputed decisions, which comprised several stages, some of which took place at national level and some at Community level, afforded the persons concerned all the necessary legal safeguards."<sup>53</sup>

The Court of Justice reiterated that the right of the individuals to submit all their arguments to the national authorities, and then the latter forwarding them to the Commission, entails an acceptable mechanism with regard to their procedural rights<sup>54</sup>. What is more, the applicants argued that a development from the case-law of the two previous cases<sup>55</sup> could be desirable. Such development would be justified in view of recent developments in the case-law of the Court regarding the rights of the defence in the field of competition law and anti-dumping duties and in view of Article 6 of the ECHR, but the Court of Justice rejected that possibility<sup>56</sup>.

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<sup>49</sup> *Ibid.* at paragraph 17.

<sup>50</sup> Joined cases 98/83 and 230/83, *Van Gend & Loos NV and Expeditiebedrijf Wim Bosman BV / Commission* [1984] ECR 3763.

<sup>51</sup> *Ibid.* at paragraph 9.

<sup>52</sup> Joint Cases C-121/91 and C-122/91, *CT Control (Rotterdam) and JCT Benelux / Commission* [1993] ECR I-3873.

<sup>53</sup> *Ibid.* at paragraph 48.

<sup>54</sup> *Ibid.* at paragraph 49.

<sup>55</sup> Namely, *Control Data* and *Van Gend & Loos*, cited above.

<sup>56</sup> *Ibid.* at paragraph 52.

Moreover, the applicants acknowledged that all the arguments which they could have put forward in favour of remission had been mentioned in their applications and that there was no new factor that they could have introduced into their arguments. As the court argued, they knew that their applications were being forwarded to the Commission and could have supplemented the arguments contained in them if they had so wished.

This point of view was adopted by the Court of First Instance in the first cases that it dealt with, but the CFI would later depart from it. Relevant conclusions can be drawn from this evolution. The following cases provide evidence of the development.

The case *French Aviation*<sup>57</sup> shows the complexity of the exercise of administrative procedural rights in a composite procedure and the initial stance of the the CFI, similar to the first case-law on recovery of structural funds described before<sup>58</sup>.

Because this case shows very well the intricacies of composite procedures and the practical exercise of procedural rights throughout them, it will be described as the paradigm of the cases on repayment of import duties and will explain why the decision of the European judges is not satisfactory. The relevant facts are the following. The applicant was a company importing aircraft components and spare parts into France under two subheadings of the Common Customs Tariff depending on whether they are intended for civil or military use. There was a more favourable tariff arrangement if the end-use of the components imported was civil and not military. According to the rules in force<sup>59</sup>, it should have requested prior authorisation to meet the conditions for such favourable treatment. However, provided that when the components in question are imported, it was impossible for the applicant to indicate in advance whether they will be fitted to civil or military aircraft, so the

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<sup>57</sup> Case T-346/94, *France Aviation / Commission* [1995] ECR II-284.

<sup>58</sup> Takis Tridimas, *The General Principles of EU Law*, Oxford University Press (Oxford, 2006), at 387.

<sup>59</sup> Article 3(1) of Commission Regulation (EEC) No 4142/87 of 9 December 1987 determining the conditions under which certain goods are eligible on import for a favourable tariff arrangement by reason of their end-use (OJ 1987 L 387, 81).

French authorities tolerated all components imported by the applicant benefitted to a consideration as "civil" subject to the periodical regularization *ex post* of the situation of components used for military purposes.

This administrative practice was subsequently modified, because the applicant had undertaken to set up a computerized private customs warehouse which would enable it to declare each component as being intended for civil or military use when it was taken out of store. The French authorities notified the applicant that they would discontinue in the future the method of the *ex post* settlement of customs duty used in the preceding years.

However, the set-up of the customs warehouse was delayed, in part, as the applicant argued, due to the slowness of the administrative authorities granting the authorisations. As a result, for three years the applicant was forced to pay the increased customs duty immediately, including that on components to be put to "civil" use. Later on, the applicant asked the customs administration for the repayment of the customs duty which it had paid in respect of imports carried out in 1990, 1991 and 1992 of components which had ultimately been fitted to civil aircraft.

Following the wording of the applicable rules, the French authorities replied at the time when the imports in question were entered for consumption, it did not have authorization qualifying it for the favourable end-use tariff arrangement with the result that the customs duty could not be reimbursed, but given the exceptional circumstances of the case, it had decided to forward the application for repayment to the Commission<sup>60</sup>, which could exceptionally agree the repayment. In order to do that, the transmission by the national authorities to the Commission should include all the facts necessary for a full examination of the case presented.

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<sup>60</sup> Pursuant to Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, 1), which states: "Import duties may be repaid or remitted in special situations other than those referred to in Sections A to D, which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned

According to the Commission Regulation implementing the Community Customs Code<sup>61</sup>, in order for this repayment to be granted the Commission should assess the information submitted by the Member State (eventually asking for additional information if necessary), consult a group of experts composed of representatives of all Member States and notify to the Member State concerned so that national authorities can decide on the application of the person concerned.

In the circumstances of the case, the French authorities had failed to describe the situation exhaustively, in particular, omitting to mention the administrative practice tolerated before and the delays in the setting-up of a customs warehouse. It all resulted in a Commission decision stating that repayment of customs duty was not justified. One of the main grounds of the applicant before the Court was infringement of the principle *audi alteram partem* inasmuch as it did not have an opportunity to put its arguments to the Commission.

The CFI agreed that the right to be heard was complied with in so far as the procedure at issue enabled the applicant to put all its arguments to the French authorities and its case, which was transmitted by those authorities, was available both to the group of experts and to the Commission. The applicant's right to be heard was thus placed in the relations between the person concerned and the national administration<sup>62</sup>.

However, it acknowledged that the Commission did not have all the necessary elements to make a reasoned decision. Despite this, the solution it finds is that the Commission should have requested additional information from the national authorities and, considering the circumstances of the case, even arranged for the applicant to be heard by the French authorities<sup>63</sup>. This denial of a right to be heard directly by the Commission stems from the fact that the applicable rules at the time

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<sup>61</sup> Commission Regulation (EEC) No 2454/93 of 2 July 1993 (OJ 1993 L 253, 1) laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, 1), in particular, Article 905 and following.

<sup>62</sup> Paragraphs 29 and 30.

<sup>63</sup> Paragraphs 34 and 35.

did not provide for any contact between the Commission and the applicant, and relied exclusively on the mediation by the national administration.

This solution, which some authors described as "bureaucratic detour"<sup>64</sup>, was an artificial mechanism to avoid confronting a clear shortcoming embedded in the very essence of composite procedures, that is, the procedural right to be heard had been 'lost' in the communications between the Commission and the national administration. The scheme envisaged by the CFI would not have solved the situation for the concerned party, as it would only see his or her interest fully protected if it could express his or her view before the body that actually makes the decision.

Ultimately, the CFI annulled the decision for the infringement of the right to be heard, but the mechanism that it suggested as the scheme being fully respectful of the interests of the applicant is highly questionable.

The ruling in *France Aviation* led the Commission to change its proceedings and ensure the right to be heard in another fashion. It also revoked the decisions it had taken without that guarantee<sup>65</sup>. However, in analogous cases that would follow afterwards, the CFI would modify its stance towards a more protective approach.

In *Eyckeler*<sup>66</sup> the circumstances were very similar to *France Aviation*. It concerned the right of repayment of import duties in special situations<sup>67</sup>. The applicant, a German importer of Argentinian beef, claimed a reimbursement because its imports had not been subject to the favourable duty it deemed applicable. The Commission considered that the application for remission was not justified<sup>68</sup>.

By contrast to *France Aviation*, the CFI found (although in this case the breach of the right to be heard was not strongly argued by the applicant) that "[d]uring the

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<sup>64</sup> Eckes and Mendes, "The Right to be Heard in Composite...", at 657 citing Hans Peter Nehl, *Principles of Administrative Procedure in EC Law*, Hart Publishing (Oxford, 1999), at 79.

<sup>65</sup> Order of the CFI in case T-22-96, *Langdon / Commission* [1996] ECR II-1011.

<sup>66</sup> Case T-42/96, *Eyckeler & Malt AG / Commission* [1998] ECR II-401.

<sup>67</sup> Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, 1).

<sup>68</sup> Case T-42/96 ... , at paragraphs 1-29.

procedure before it, the Commission did not give the applicant an opportunity to put its case and effectively make its views known on the relevant circumstances relied on against it as the basis for the contested decision."<sup>69</sup> So "the contested decision was adopted following an administrative procedure which was vitiated by a breach of essential procedural requirements."<sup>70</sup> As a result, even when the applicable rules did not foresee a hearing before the Commission, the CFI understood that such a procedural step was necessary in order to fully guarantee the rights of defence.

The CFI elaborated its position in its ruling in *Primex Produkte*<sup>71</sup>. Again a case involving the repayment of import duties, the CFI maintained that the right to be heard must take place before the EU administration inasmuch as it is the body who enjoys the discretion to take a decisions, in view of the circumstances of the case and the position of the interested person. It stated:

"The principle of respect for the rights of the defence thus requires not only that the person concerned should be placed in a position in which he may effectively make known his views on the relevant circumstances, but also that he should at least be able to put his own case on the documents taken into account by the Community institution."<sup>72</sup>

The position of the CFI became clearer in the case *Mehibas Dortselaan*<sup>73</sup>. The reimbursement of certain import duties was again at stake. However, in this case the applicant had had the opportunity to express its views to the national authority, but this element, that could have been considered sufficient under the light of *France Aviation*, did not exclude that the interested person had to be heard before the Commission as it was the body who had the discretion to take a decision. That was

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<sup>69</sup> *Ibid.* at paragraph 86.

<sup>70</sup> *Ibid.* at paragraph 88.

<sup>71</sup> T-50/96, *Primex Produkte Import Export GmbH and others / Commission*, [1998] ECR II-377.

<sup>72</sup> *Ibid.* at paragraph 63.

<sup>73</sup> T-290/97, *Mehibas Dordtselann BV / Commission* [2000] ECR II-15.

true, the Court stated, even though the rules in question<sup>74</sup> did not provide for a contact of the company with the Commission because the right to be heard is a fundamental principle of Community law<sup>75</sup>. Nevertheless, the CFI would eventually dismiss the action because it considered that without the irregularity consisting on the lack of hearing before the Commission, the procedure would not have resulted in a different decision<sup>76</sup>.

The idea of an autonomous right to be heard is stated even more clearly in the following case *Wilson Holland*<sup>77</sup>, where the CFI argues that "[t]hat conclusion (that applicant were not heard before the Commission) is not affected by the fact that most of the applicants made a declaration that the file which the national authorities transmitted to the Commission was complete and they had nothing to add."<sup>78</sup>

This implies that fully expressing its position before the national authorities and having that position transmitted by the Member State to the Commission is not enough because the right to be heard is a procedural right of the individual that must be exercised before the authority that has the discretion to make a decision able to affect his or her interests.

The case law on the right to be heard related to repayment of import duties stopped at this point, because the Commission Regulation implementing the Community Customs Code was amended in order to include this right to be heard before the Commission<sup>79</sup>. The Court of Justice did not have the chance to rule on the stance taken by the CFI<sup>80</sup>.

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<sup>74</sup> Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, 1)

<sup>75</sup> T-290/97 ... at paragraph 46.

<sup>76</sup> *Ibid.* at paragraph 50.

<sup>77</sup> Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, *Wilson Holland and others / Commission* [2001] ECR II-1337.

<sup>78</sup> *Ibid.* at paragraph 160.

<sup>79</sup> Article 906a was added by Commission Regulation (EC) No 1677/98 of 29 July 1998 (OJ 1998 L 212, 18) with the following wording:

"Where, at any time in the procedure provided for in Articles 906 and 907, the Commission intends to take a decision unfavourable towards the applicant for repayment or remission, it shall communicate its



As a result, the development of the case-law in this subject-matter has cleared the way for the interpretation advocated in this work. The right to be heard must take place at the level where the discretionary power to make the decision lies, be it the Union's or national public administration. It makes sense because the essence of the right to be heard is that the position of the concerned party is taken into account by the body with the competence to issue a decision that concerns him or her. It is easy to see that this procedural right is not fully guaranteed when exercised before an intermediary body because, as we saw in practice when commenting the court cases, sometimes the transmission is not fully satisfactory, or there needs to be a truly exchange of views between the individual and the authority, or new evidence appears and it is unpractical to have the national authorities intervening as well, as the *Vlaams Fonds* case showed. In practice, a rule such as the one now enacted in the implementing provisions of the Customs Code requiring the right to a hearing to take place at the relevant level is also more straightforward and less complex.

It is thus striking that the European courts have not come to the same conclusion in the other area where the right to be heard in composite procedures is highly contentious, that is, the recovery of structural funds. Before dwelling into the justification of this different treatment, there is an additional subject-matter where in a composite mechanism of decision-making the right to be heard has been highly controversial.

### *5.2.3.- Case-law on the listings of terrorist organisations*

The following area of case-law where the approach of the CFI and the Court of Justice on the right to be heard and other procedural guarantees for the individual is that of the sanctions adopted by the Council against persons or organisations with links to terrorist groups, which has attracted a lot of scholarly attention during the past

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objections to him/her in writing, together with all the documents on which it bases those objections. The applicant for repayment or remission shall express his/her point of view in writing within a period of one month from the date on which the objections were sent. If he/she does not give his/her point of view within that period, he/she shall be deemed to have waived the right to express a position."

<sup>80</sup> Only cases T-42/96 and T-50/96 were appealed before the Court of Justice (cases C-163/98 P and C-417/98 P, respectively), but the Commission later dropped its appeals.

decade<sup>81</sup>. The *Kadi* case, resolved differently by the CFI<sup>82</sup> and the Court of Justice<sup>83</sup>, and its sequels<sup>84</sup>, brought a lot of attention among EU legal scholars<sup>85</sup> in an area that had traditionally had only a marginal impact in the whole of the EU law. This is a paramount case in areas such as fundamental rights and the position of public law in among the sources of EU law. For the purposes of composite procedures, its relevance is limited. Other cases in the field of antiterrorist measures of the decade of 2000 better illustrate the position of the EU courts with regard to the right to be heard and its consequences for composite procedures.

In the context of composite procedures, the case-law in this area present several peculiarities that render these cases substantially different from the general notion of composite procedures which is the focus of this thesis and the reasoning of these judgements cannot be generalised to other composite procedure where the tension between legal principles (and political considerations) is not so acute. However, some elements of the reasoning of the EU courts in confronting the legal dilemmas in this subject-matter, where a national decision is the base of a EU act that, as we will see, often ignores procedural basic guarantees of the individual, will enable us to develop further insights on the legal protection of the right to be heard in composite procedures.

These peculiarities are the following. Although they are administrative procedures aimed at listing persons and organisations linked to terrorist acts, the

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<sup>81</sup> Luca Paladini, "The European Charter of Fundamental Rights after Lisbon: a 'timid' Trojan horse in the domain of the common foreign and security policy?", in Giacomo di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, Springer, (New York, 2011), 265-85, at 268.

<sup>82</sup> Case T-315/01, *Kadi / Council and Commission* [2005] ECR II-3649. Joined Cases C-402/05 P and C-415/05, P. *Kadi and Al Barakaat International Foundation / Council and Commission* [2008] ECR I-6351.

<sup>83</sup> Joined Cases C-402/05 P and C-415/05, P. *Kadi and Al Barakaat International Foundation / Council and Commission* [2008] ECR I-6351.

<sup>84</sup> Case T-315/01, *Kadi / Council and Commission* [2005] II-03649; Case C-402/05 P, *Kadi and Al Barakaat International Foundation / Council and Commission* [2008] ECR I-06351; Case T-85/09, *Kadi / Commission* [2010] ECR II-05177; and Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission / Kadi* [2013] (ECLI:EU:C:2013:518)..

<sup>85</sup> See for a general overview of the many scholarly articles on the rulings, Juliane Kokott and Christoph Sobotta, "The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?", 23(4) *European Journal of International Law* (2012), 1015-24.

nature of the cases is borderline with criminal law, meaning that the decisions taken at the EU level need a prior backing of a national judgement of a criminal court. Furthermore, complex elements of international law are also present and the cases do not only involve national and EU actors, but also at times international actors, such as the United Nations. A further particular element, is that the decision-maker at the EU level is the Council acting in the field of the Common Foreign and Security Policy, at the time outside of the EC pillar, so certainly not the most usual body considered in this dissertation as 'European public administration'.<sup>86</sup>

Keeping these considerations in mind, the approach of the CFI and the Court of Justice to these cases does allow us to draw some relevant conclusions of the effectiveness of the right to be heard in composite procedures and the mechanisms to ensure the procedural rights in such complex procedures.

The relevant rules applicable and their context were as follows. In 2001, the United Nations Security Council issued Resolution 1373(2001) laying down strategies to combat terrorism<sup>87</sup>. On the European level, the Resolution was implemented through Common Position 2001/931/CFSP<sup>88</sup> and Regulation 2580/2001<sup>89</sup> which ordered the freezing of funds and other financial assets or economic resources of “persons, groups and entities involved in terrorist attacks” as determined by a “competent authority”<sup>90</sup>. The UN Security Council complemented later these

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<sup>86</sup> The decision taken at the EU level are still administrative decisions, taken after an administrative procedure, and I do not argue the European administration can be equalled to the Commission (as I explained with more detail in Chapter II), however, the Commission and the agencies are the more frequent 'European public administration' in the normal cases that are examined during this thesis, so the intervention of the Council in the field of CFSP is another particular element to take the reasoning in this field with caution.

<sup>87</sup> United Nations Security Council Resolution 1373 (2001) of 28 September 2001, laying down strategies to combat terrorism by all means, in particular the financing thereof.

<sup>88</sup> Council Common Position 2001/931/CFSP, On the Application of Specific Measures to Combat Terrorism, (OJ 2001 L 344, at 93).

<sup>89</sup> Council Regulation 2580/2001, On Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, (OJ 2001 L 344, at 70).

<sup>90</sup> Elena Bratanova, "Terrorist Financing and EU Sanctions Lists: Is The Court's annulment of a Council Decision a lasting Protection for an Organization?", 15 *Columbia Journal of European Law* (2009), 7-11, at 7.

measures with other more specific rules that pinpointed some specific organisations<sup>91</sup>. The lists of persons and organisations were to be drawn up on the basis, among others, of a decision taken by a national 'competent authority', meaning a judicial authority or, where judicial authorities have no competence in the relevant area, an equivalent competent authority in that area.

The case-law involving a national decision as a pre-requisite started with the action brought by the *People's Mojahedin Organization of Iran* against the decision of the Council to list it as an organization with links to terrorist acts<sup>92</sup>. This case is a good example because the basic arguments of the CFI are already laid down, and the same applicant would litigate in the European courts on several other occasions.

In this case, the national decision was an order of the United Kingdom Secretary of State for the Home Department. The applicant had challenged unsuccessfully such order in the British jurisdiction, and according to the rulings at the national level, there was no requirement to hear the applicant's views beforehand, considering such hearing impractical or undesirable in the context of legislation directed against terrorism<sup>93</sup>.

The line of reasoning of the CFI was the following. According to the applicable rules, there are two kinds of listings. An initial listing and a subsequent listing, the latter following a decision to keep the concerned organisation in the list. The CFI admits that a hearing prior to the first listing would jeopardise the

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<sup>91</sup> The following year the Security Council passed Resolution 1390 (2002), which deals exclusively with Osama bin Laden, Al-Qaeda, and the Taliban, and leaves no discretion to the Member States where the lists were created at the level of the UN Security Council's Sanction Committee. The implementing legislation for Resolution 1390 (2002), Council Regulation 881/2002, Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Osama bin Laden, the Al-Qaeda Network and the Taliban, (OJ 2002 L 139, at 9) (the list annexed to this regulation is reviewed by the Commission, on the basis of updating by the Sanctions Committee). This regulation was annulled in the Court of Justice's *Kadi* decision, referred to before. In the *Kadi* saga the European Union, via the Council, lists persons or organisations with links to terrorists groups in execution of a UN Security Council sanction.

<sup>92</sup> Case T-228/02, *People's Mojahedin Organization of Iran / Council*, [2002] ERC II-4665. The decision by which the organization was listed was Common Position 2002/340/CFSP, of 2 May 2002 (OJ 2002 L 116, 75).

<sup>93</sup> Case T-228/02, ... at paragraph 16.

effectiveness of the system<sup>94</sup>. However, this is not the case for the subsequent listings, where a previous hearing must be mandatory<sup>95</sup>. In accordance with the reasoning of the CFI, however, this hearing must take place at the national level<sup>96</sup>. It went on to argue that the principle of sincere cooperation entails for the Council the obligation to defer as far as possible to the assessment conducted by the national authority<sup>97</sup>. Since it could not be proven that there was any kind of hearing at the national level, and there were several other breaches like the infringement of the duty to state reasons and that of the the right to a fair trial<sup>98</sup>, the CFI decided to annul the listing.

Following the reasoning that we have developed in the previous sections, a prior hearing shall be a requirement whenever a decision taken with a certain degree of discretion happens. If the decision by the Council to list was automatic once the decision of the national authorities is forwarded to it, it would make sense to keep the right to a hearing at the national level. This is, however, not the case. The CFI recognised that the Council enjoys broad discretion in its assessment and although it needs a decision of a national authority to list, it is under no obligation to do so once it is notified<sup>99</sup>. For this reason, it cannot be understood how a hearing at the national level would be sufficiently protective of the rights of the concerned party.

After the first ruling of the CFI there were two additional cases brought again by the same organisation<sup>100</sup>, because it was maintained in the lists in spite of the first rulings. The CFI denied categorically that this right to a prior hearing before the

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<sup>94</sup> *Ibid.* at paragraph 128. There needed to be a surprise effect so that the freezing of assets was effective, otherwise, the concerned party could move their assets to a country not implementing the UN Security Council resolutions.

<sup>95</sup> *Ibid.* at paragraph 137.

<sup>96</sup> *Ibid.* at paragraph 119, there are practical reason for this, as the Union's body with the competence to draw the lists is the Council and in the field of CFSP, the effective organisation of these hearings would be highly complicated.

<sup>97</sup> *Ibid.* at paragraph 122.

<sup>98</sup> *Ibid.* at paragraphs 214, 218, and 225..

<sup>99</sup> *Ibid.* at paragraph 159.

<sup>100</sup> T-256/07, People's Mojahedin Organization of Iran / Council, [2008] ECR II-3019; and T-284/08, People's Mojahedin Organization of Iran / Council, [2008] ECR II-3487.

Council exists in this particular case as claimed by the applicant<sup>101</sup>, although it did argue that the organisation should have been informed of the evidence against it and the reasons for its listing. At the end, the CFI annulled the listings again on the ground that the British authorities had by that time ordered the removal of the applicant from the lists<sup>102</sup>.

In this vein, the reasoning of the CFI is aligned with the old ruling in *France Aviation*, inasmuch as the right to be heard can be safeguarded at the national level. Except that, in these cases, the CFI goes a step farther in the removing the procedural protection of the individual and relinquishes the EU institutions of any duty to control the procedural conduct of the national authorities<sup>103</sup>.

Since 2007, the Council introduced some changes in the procedure for listing<sup>104</sup>, in particular, the obligations to notify the listing to the concerned party, to provide them with a statement of reasons, to give them a right to request de-listing, and to challenge the decision to list before the General Court. However, the right to a prior hearing is still not guaranteed at the Council level. With the measures introduced in 2007, the breaches in procedural rights seem less flagrant. However, for the purposes of the right to be heard in composite procedures, there are still grounds to remain critical of system, as well as of the position of the European courts about it.

There would be other cases where the CFI would stick to this view<sup>105</sup>. The Court of Justice would endorse the arguments of the CFI in the different appeals<sup>106</sup>.

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<sup>101</sup> T-256/07 ... at paragraph 93. The CFI states: "With regard to the applicant's argument concerning the Council's refusal of its request to be heard at a formal hearing, it is sufficient to state that neither the legislation in question, namely, Regulation No 2580/2001, nor the general principle of observance of the rights of the defence, gives the persons concerned the right to such a hearing".

<sup>102</sup> T-256/07 ... at paragraph 180.

<sup>103</sup> Eckes and Mendes, "The Right to be Heard in Composite...", at 665.

<sup>104</sup> These changes are summarised in the Council Document 10826/07, of 28 June 2007, not published in the OJ, but declassified and available in the link:  
<https://www.consilium.europa.eu/uedocs/cmsUpload/st10826-re01en07.pdf>

<sup>105</sup> T-390/08, *Bank Melli Iran / Council* [2009] ECR II-3967, at paragraph 96; T-348/07, *Stichting Al-Aqsa / Council of the European Union* [2010] ECR II-4575, at paragraph 165; and Joined cases T-329/12 and T-74/13, *Mazen Al-Tabbaa / Council of the European Union*, [2014] (ECLI:EU:T:2014:622), at paragraph 76.

The much awaited ruling in *Kadi II* seems to have put an end to most of the scholarly concerns<sup>107</sup> of the backlash on the protection of fundamental rights with regard to the counter terrorist legislation of the last decade<sup>108</sup>. Although with this last ruling and the modifications in the antiterrorist legislation, the listing of such organizations will be less controversial and, in practice, the level of procedural guarantees has been increased, the position of the European judicature is still unsatisfactory.

As it was previously argued, in composite procedures every discretionary decision taken at the EU or national level must be proceeded by certain procedural guarantees, among them the right to a prior hearing. That being said, as it was warned in the beginning of this section, it would be a mistake to extrapolate the reasoning of the EU courts on the area of antiterrorist measures to other composite procedures in ordinary circumstances.

#### *5.2.4.- Remarks on the current state of affairs of the case-law on the right to be heard in composite procedures and rights-oriented approach*

In view of the case-law of the European courts on the right to be heard in composite procedures, it is striking that their position is so different in each of the three examined areas. Whereas in the repayment of import duties the CFI finally came to the conclusion that a hearing at the level where the decision was taken was necessary, in the structural funds cases it was enough that such hearing took place at the national level, but the European authorities should ensure that it had taken place under the appropriate guarantees. In the antiterrorist legislation cases, the Court of Justice goes further and considers sufficient that the hearing took place at the national level, but with no duty to monitor to what extent the guarantees at the national level were sufficient.

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<sup>106</sup> For instance, in C-27/09 P, *France / People's Mojahedin Organization of Iran* [2011] ECR I-13427, on appeal against T-284/08, or Case C-548/09 P, *Bank Melli Iran / Council* [2011] ECR I-11381, upholding the ruling on T-390/08 ... .

<sup>107</sup> See in this respect Takis Tridimas, "Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments" 12 *Cambridge Yearbook of European Legal Studies* (2010), 455-90.

<sup>108</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission / Kadi* [2013] (ECLI:EU:C:2013:518)..



These different, contradictory approaches are a direct consequence of the absence of a general category of composite procedure for the European courts. The individual, differentiated approach that they take for each set of cases result in substantial inconsistencies. It is useful for our purposes to investigate on the reasons for the different treatment given by the CFI and the Court of Justice, particularly, given that the cases of antiterrorist legislation are very specific, regarding the fields of import duties and structural funds.

The question was addressed specifically by Advocate General Mischo<sup>109</sup> in the appeal of one of the ESF cases described above. For him, the reason can be found in the more unfavourable character of customs duties with respect to structural funds. The first have a negative impact in the estate of the individual, whereas the latter have a positive one, even considering their recovery does not imply a worse position as the individual had at the beginning. In other words, Advocate General Mischo is of the opinion that the concerned party is not penalised when it is called to give back the funds he was granted if the conditions are not fulfilled. Moreover, in the field of structural funds the economic agent is the one that decides to institute the procedure, not the public authority<sup>110</sup>.

It is true that procedural rights need stronger protection in the framework of procedures susceptible of penalising the individual than in procedures by which the individual aims at acquiring a right that he or she did not enjoy before or, in other words, the intensity of the interference with the person's legal sphere should be in

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<sup>109</sup> Opinion of Advocate General Misho delivered on 25 November 1999, Case C-462/98 P, *Mediocruso / Commission* [2000] ECR I-7185.

<sup>110</sup> *Ibid.* at paragraphs 17 and 18. It is worth reproducing the opinion literally in this regard:  
"17. ... with regard to the remission of import duties, it is necessary to make a distinction between fields such as competition law or the collection of anti-dumping duties, where it is the Community institutions which decide to institute the procedure which may lead to the punishment of an economic agent who has contravened the provisions of the Treaty, and other situations.  
18. In the context of the ESF, it is undertakings or private individuals who submit applications for aid from the Fund. That aid is granted subject to certain conditions. If those conditions are not observed, a reduction may be made in the aid. In accordance with the distinction made by the Court of Justice, that situation is not to be treated in the same way as the procedures for penalising an economic agent, in which the *audi alteram partem* rule therefore assumes special importance. It is therefore sufficient, in order for that rule to be observed, for the beneficiary to have had the possibility of making known to the Commission, either directly or through the competent national body, the reasons for which it considers that the reduction of aid is not justified, before the Commission takes its final decision. ..."

accordance with the protection of his or her procedural rights<sup>111</sup>. Koen Lenaerts described in a paper the academic debate on a FIDE Conference in 1997<sup>112</sup> on whether there should always be a right to a fair hearing in procedures initiated by the applicant aimed at granting him or her a right, following a controversial ruling of the CFI in *Windpark Groothusen*<sup>113</sup>. He argues that, in cases where the applicable legislation does not confer a right upon the applicant to make known his views at some stage following the filing of his application, the recognition of any such right was not always mandatory.

That conclusion would be harder to maintain at the moment in the light of Article 41 ChFR, which does not make a distinction on the type of administrative procedures for the recognition of this fundamental right. But more importantly, in the structural funds cases examined in the previous section, the right to be heard must be observed -even "on behalf of" according to the CFI- because the procedure for recovery was not initiated by the applicant and it might indeed affect the individual

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<sup>111</sup> Joana Mendes, "Participation and Participation Rights in EU Law and Governance", in Herwig Hofmann and Alexander Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar (Cheltenham, 2009), 257-87, at 273.

<sup>112</sup> Koen Lenaerts and Jan Vanhamme, "Procedural rights of private parties in the community administrative process", 34 *Common Law review* (1997) 531-69, at 537; "Upon discussion of this case law at the FIDE Conference, the tentative conclusion was reached that the applicant in administrative proceedings should be granted the right to a fair hearing to the extent that the administration has gathered evidence against him or targets him with his own behaviour while handling his application. In any event, there appeared to be consensus that, in cases where the applicable legislation does not confer a right upon the applicant to make known his views at some stage following the filing of his application, the recognition of any such right should be the exception rather than the rule. It is in line with that thought that the result of the *Windpark Groothusen* case must be seen. In that case, the Court of First Instance considered it logical that financial support programmes are solely conducted on the basis of the documentation submitted by the requesting undertakings in their applications."

<sup>113</sup> Case T-109/94, *Windpark Groothusen GmbH & Co. Betriebs-KG v Commission* [1995] ECR II-3007. Even though the CFI denied the infringement of a right to be heard as claimed by the applicant, the circumstances of the case were quite particular and, in any case, fundamentally different from the structural funds cases that we examined.

"48 The Court notes, first, that the Commission explained the procedure for the submission of projects for financial support ... it is in accordance with the procedure in financial support programmes for candidates for such support not to be given a hearing during the selection procedure, which is conducted on the basis of the documentation submitted by them. That procedure is appropriate in situations where hundreds of applications must be evaluated and it therefore does not constitute an infringement of the right to a hearing. ...

50 The facts in the present case are quite different from those underlying the judgment of the Court of First Instance in Case T-450/93 *Lisrestal v Commission* [1994] ECR II-1177, relied on by the applicant. In that case, the Court ruled that, where the Commission intends to reduce the financial assistance originally granted, the beneficiary must be placed in a position in which it can effectively make known its views on the evidence relied on against it to justify the decision reducing the assistance. In the present case, no financial support had been granted to the applicant which had merely been placed on a reserve list of possible beneficiaries of Community financial support. "

adversely<sup>114</sup>. The argument of the differentiated treatment becomes even weaker if it is put under the light of the antiterrorist legislation cases. In that area, where the Court of Justice endorses a much less protective stance of procedural rights, even though those cases entail much more stringent possible restrictions of individual rights, being borderline, as regards their effects, with criminal offences.

In recent cases concerning asylum procedures in the national context, the understanding of the scope of the right to be heard continues to be quite limited. An example of such statement in the ruling in *Mukarubega*<sup>115</sup>, where the Court of Justice was asked by a French judge whether or not according to the law of the Union third-country nationals who have been duly heard on the illegality of their stay need to be heard again before the adoption of a return decision. The answer of the Court of Justice is that such hearing must not take place again. This situation remains at the very national level without any composite element, but the reasoning is revelatory, because the Court of Justice considers sufficient the previous hearing before the administrative authorities (police), and thus unnecessary again before the judge takes the return decision<sup>116</sup>. The Court of Justice justifies it by arguing that reason is that a return decision is closely linked to the decision determining that a stay is illegal<sup>117</sup> but, while that is true, the national judge still has a margin of manouvre to decide and it is not bound to automatically issue such return decision. As we have maintained, that element of discretion in the last authority to decide is the key element to require a further hearing. Consequently, there are arguments to adopt a critical view of the position of the Court of Justice.

In conclusion, the arguments justifying the different approach on the right to be heard are unconvincing and the different rationales of the Court of Justice and GC

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<sup>114</sup> In all of the aforementioned cases the CFI acknowledged that: "It is equally settled case-law that a Commission decision reducing or cancelling financial assistance granted by the ESF is capable of directly and individually concerning the beneficiaries of such assistance and of adversely affecting them." See Case T-450/93 *Lisrestal and Others / Commission* [1994] ECR II-1177, paragraph 44; Case T-102/00, *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap / Commission* [2003] ECR II-2433, at paragraph 60; and Case T-158/07, *Cofac / Commission* [2009] ECR II-237, at paragraph 36.

<sup>115</sup> Case C-166/13 *Sophie Mukarubega / Préfet de police and Préfet de la Seine-Saint-Denis* [2014] (ECLI:EU:C:2014:2336).

<sup>116</sup> *Ibid.* at paragraph 82.

<sup>117</sup> *Ibid.* at paragraph 60.

are difficult to justify. In reality, the reason for this fragmented case-law is the lack of a unitary approach towards composite procedures. If seen as a peculiar category of administrative procedures, composite procedures would enjoy a homogeneous judicial approach. This is an essential reason why composite procedures should be included in a general codification of administrative procedure at the EU level<sup>118</sup>.

In the context of composite procedures, the only way to keep the right to a fair hearing sufficiently protected is to give the opportunity for the applicant to express his or her position on the file at level of the administration that enjoys the discretion to formulate a decision. In the cases that we have examined where the Member States were mere interlocutors with no formal powers, the solution is quite straightforward; grant this right before the European Union authority in charge, in the sense of the amendment of the implementing Regulation of the Customs Code<sup>119</sup>.

The solution might be more complex in cases where both levels of administration have the discretion to make an assessment and issue a decision. In some of the recent regulations where a procedure with such characteristics is laid down, the right to be heard is already ensured more than once whenever an administrative body has to make a decision. The case of the procedure for the authorisation of pesticides<sup>120</sup> analysed in the previous Chapter<sup>121</sup> is very illuminating: the applicant has the right to make observations when the Member State authority is considering the admissibility of the application<sup>122</sup>, later when the assessment report drafted by the national body is evaluated by the EFSA<sup>123</sup>, and finally when the

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<sup>118</sup> Sabrina Nöhmer, *Das Recht auf Anhörung im europäischen Verwaltungsverfahren*, Mohr Siebeck (Tübingen, 2013), at 317. After a detailed analysis of the right to be heard in the European Union, this work posits a homogeneous treatment of this right through a general code on administrative procedure.

<sup>119</sup> See note 79.

<sup>120</sup> Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, 1-47).

<sup>121</sup> See section 4.4.2.

<sup>122</sup> Article 9(2).

<sup>123</sup> Article 12(1).

Commission is ready to make a final decision<sup>124</sup>. However, this protection of the right to be heard is not present in all of the recently enacted composite procedures<sup>125</sup>.

However, in the procedural schemes where one level of administration makes a recommendation that can later be contradicted by the other level of administration, the right to be heard can work effectively if it takes place before the final decision is made, as long as the concerned party has full information on the recommendation and is given the possibility to refute the conclusion of such recommendation.

The generalisation of this scheme with a rule that mandates the possibility for the concerned person to submit observations at the authority with the competence to make a discretionary decision, on several occasions if the stages of the procedure so require, would be the only mechanism to ensure a sufficient protection of the right to be heard in composite procedures. This conclusion is in line with the proposal of the research network on EU administrative law (ReNEUAL). In the draft model rules on EU administrative procedures presented in 2014, Article III-24 proposes the rules on the right to be heard in composite procedures, and it specifies that the right shall be respected at all stages of a composite procedure, national and European<sup>126</sup>.

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<sup>124</sup> Article 13(1).

<sup>125</sup> Joana Mendes, "Participation in European Union Rulemaking. A Rights-Based Approach", Oxford University Press (Oxford, 2011), at section 7.2.2.

<sup>126</sup> The Draft model rules were presented in the ReNEUAL conference of 19 May 2014, for which documentation is available at [www.reneual.eu](http://www.reneual.eu).

Book III - Single case decision making. Article III-24:

Right to be heard in composite procedures

"(2) In a case of composite procedure, where an EU authority makes the decision it must comply with the procedural requirements in Article III-23. Where the decision is made by a Member State authority it must comply with the requirements of Article III-23 where sector specific legislation renders the procedural rules in Book III applicable. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings.

(3) In a case of composite procedure, the form and content of the hearing provided pursuant to Article III-23 (5) by the public authority that makes the decision will be affected by the extent to which the rights of the defence were adequately protected at a prior stage in the administrative proceedings by another public authority.

(4) In a case of composite procedure, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles in Article III-23 (3)-(5).

(...)

(5) In a case of composite procedure, where the EU authority's decision is predicated on a recommendation made by another public authority and where there was no opportunity for a hearing

### **5.3.- The obligation to state reasons**

#### *5.3.1.- The right to a reasoned decision as a citizen's right under EU law*

The duty to state reasons is at the gist of the legitimation of modern public administration. At one point of modern history, myth, tradition, culture or inheritance can no longer constitute valid ground for the exercise of public power, and it will have to be based on reasons<sup>127</sup>, connected with legality, fairness, openness, impartiality, transparency and other values attributed to modern administrative law<sup>128</sup>.

The discretion awarded to the public administration can be acceptable for individuals, even if it is in their detriment, because reasons can be given why those subject to the law would affirm its content as serving recognisable public purposes<sup>129</sup>. As Max Weber argued in justification of the powers of the administration, "the legitimacy of bureaucratic action resides in the promise to exercise power in the basis of knowledge"<sup>130</sup> and, being accountable for the decision it makes, that knowledge must be shared to reassure the individual or, in case of review, the courts.

The obligation to state reasons prevents arbitrary rule in decision making, following the maxim of logic, "no conclusions without premises". Thus, if they are not to act capriciously in taking decision, decision-makers need to narrow down their choices to find a way of avoiding distraction and focusing on the things that need

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before such a public authority, the right to be heard before the decision is taken shall include knowledge of the recommendation and the ability to contest its findings(...)" See further note 97 in Chapter 6.

<sup>127</sup> Jeffrey L. Mashaw, "Small Things like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State", 70(1) *Fordham Law Review* (2001), 17-35, at 19

<sup>128</sup> Michael Taggart, "The Province of Administrative Law Determined", in Michael Taggart (ed.), *The Province of Administrative Law*, Hart Publishing (Oxford, 1997), 1-20, at 3.

<sup>129</sup> Jerry L. Mashaw, "Reasoned Administration: The European Union and the United States, and the project of Democratic Governance", 76(1) *George Washington Law Review* (2007), 99-124, at 118.

<sup>130</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology. Volume 3*, Bedminster Press (New York, 1968), at 956-1003, cited in Mashaw, "Small Things like Reasons...", at 23.

attention at a given time<sup>131</sup>. This statement, which can be applied to general situations, can be translated into legal terms as the limitation of the choices based on procedural rules, as well as the legal rights and protected interests at stake. This need of legitimisation of the measures taken by administrative authorities is felt even more intensely the case of actors not belonging to a State<sup>132</sup>.

This obligation on the administration is a well embedded principle in the administrative law traditions on the Member States. In most national legislations, the obligation to state reasons for individual decision is mandated<sup>133</sup>, and in some constitutional texts, there are references that can be interpreted in this sense<sup>134</sup>. In a wider context, the ECtHR has argued that the duty to give reasons is implicit in the rights protected in Article 6 ECHR<sup>135</sup>.

In the European Union, the duty to state reasons appeared from the beginning in primary law with the peculiarity that is concerned acts of general application (rules), unlike the national legislation, where this duty was related to individual decisions<sup>136</sup>. Article 296(2) TFEU, similarly to former Article 190 TEEC, reads:

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<sup>131</sup> Herbert Simon, *Reason in Human Affairs*, Blackwell (Oxford, 1983), at 5 and 77, cited in Carol Harlow, Richard Rawlings, *Law and Administration*, Cambridge University Press (Cambridge, 2009), at 105.

<sup>132</sup> Sabino Cassese, "A Global Due Process of Law?", in Gordon Anthony, Jean-Bernard Auby, John Morison, and Tom Zwart (eds.), *Values in Global Administrative Law*, Hart Publishing (Oxford 2011), 17-60.

<sup>133</sup> In France there is a specific law, the Act n° 79-587 of 11 July 1979 concerning the motivation of administrative decisions and the improvement of the relations between the administration and the public. In other cases, it is a provision inserted in the general administrative procedure act *Verwaltungsverfahrensgesetz*, like Article 39 of the German Federal law on Administrative procedure and Article 54 of the Spanish Law 30/1992 on the legal regime of the public administrations and the common administrative procedure. The United Kingdom, however, is an exception, where common law does not at present recognise a general duty to give reasons for an administrative decision (*R. v Secretary of State for the Home Department ex parte Doody* [1994] 1 A.C. 531, at 564), see Mark Elliot, "Has the Common Law Duty to Give Reasons Come of Age Yet?", 1 *Public Law* (2011), 56-74, at 57.

<sup>134</sup> Examples of this constitutional protection could be like the prohibition or arbitrariness of the Spanish Constitution of 1978 (Article 103) or the duty of good administration (*buon andamento*) in the Italian Constitution of 1947 (Article 97), see further Juli Ponce, "Good Administration and Administrative Procedures", 12 *Indiana Journal of Global Legal Studies* (2005)

<sup>135</sup> *Hadjianastassiou / Greece* (A/252-A) 1993, EHRR - 219, at 237.

<sup>136</sup> As professor Craig affirms, the scope of the duty to state reasons is thus significantly wider in the EU than in Member States, Paul Crag, *EU Administrative Law*, Oxford University Press (Oxford, 2012), at 341.



"Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."

The obligation to state reasons for acts of general application is related to the principle of conferral and the need to ensure that the Union is acting within the limits of its competences<sup>137</sup>.

This obligation concerns individual decisions as well. The Court of Justice gave details from its early jurisprudence on the nature of this obligation, linking it to the right of the individuals during the administrative procedure. Thus, in case 24/62 *Commission / Council* it argued<sup>138</sup>:

*"In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty."*

The Court of Justice soon distinguished between general acts and decisions as to the standards applicable in terms of statement or reasons need to differ, being stricter for individual decisions<sup>139</sup>, whereas for legislative acts, the Court of Justice finds reference to the legal basis and the appropriate competences is an acceptable legal justification<sup>140</sup>.

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<sup>137</sup> August Reinisch, *Essential Questions in EU Law*, Cambridge University Press (Cambridge, 2009), at 39; this duty is aimed also at preventing abuse in the obligation to have a proper legal base, *see for instance*, Case 45/86, *Commission / Council* (Tariff Preferences), [1987] ECR 1493.

<sup>138</sup> C-24/62, *Germany / Commission* [1963] ECR (English special edition) 63, at 69, reiterated later in Case 203/85 *Nicolet Instrument / Hauptzollamt Frankfurt am Main-Flughafen* [1986] ECR 2049 and Case C-269/90 *Hauptzollamt Muenchen-Mitte / Technische Universitaet Muenchen* [1991] ECR I-5469.

<sup>139</sup> Case 5/67, *Beus GmbH / Hauptzollamt München* [1968] ERC 83, (English special edition) at 95. Also, Case C-284/94 *Spain / Council* [1998] I-7309, at paragraph 28, and T-185/05, *Italy / Commission* [2008] ECR II-3207, at paragraph 123.

<sup>140</sup> Case 158/80 *Rewe-Handelsgesellschaft Nord and Rewe-Markt Steffen* [1981] ECR 1805, paragraph 26.

This distinction has been notoriously reflected in the recognition of the obligation to state reason, or the right to a reasoned decision, conceived within the right to a good administration, and thus, as a fundamental right of the EU in Article 41(2)(c) ChFR, for which the scope is limited to individual decisions<sup>141</sup>.

The Court of Justice elaborated on the rationale behind this obligation in terms of the subsequent judicial review of the decision, as the reasons stated would serve as the grounds on which the legality of the contested measure would be adjudicated by the Court<sup>142</sup>. Consequently, when assessing whether the reasons provided are sufficient, the EU courts focus on the expression of the facts and legal considerations which are of decisive importance in the context of the decision and verify whether the decision is well founded<sup>143</sup>.

However, there is an additional implication of this duty of the decision-maker, which is more closely related to the subjective rights of the concerned party. That is that the knowledge of the relevant facts and legal grounds so as to assess the pertinence of challenging the measure before the courts. These two rationalities appear interlinked in the ruling of the Court of Justice in *Heylens*<sup>144</sup>:

*"Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the*

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<sup>141</sup> Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, *Administrative Law and Policy of the European Union*, Oxford University Press (Oxford, 2011), at 199.

<sup>142</sup> Joined Cases 296/82 and 318/82, *Netherlands and Leeuwarder Papierwarenfabriek / Commission* [1985] ECR 809, paragraph 19. The same reasoning can be found in Case C-350/88 *Delacre and Others / Commission* [1990] ECR I-395, paragraphs 15 and 16, and Case C-56/93 *Belgium / Commission* [1996] ECR I-723, paragraph 86, and C-367/95 P, *Commission / Sytraval and Brink's France* [1998] ECR I-1719.

<sup>143</sup> Case 55/69 *Cassella / Commission* [1972] ECR 887, paragraph 22, Case 56/69 *Hoechst / Commission* [1972] ECR 927, paragraph 22, Joined Cases 43 and 62/82 *VBVB and VBBB / Commission* [1984] ECR 19 at paragraph 22, and of the Court of First Instance in Case T-44/90 *La Cinq / Commission* [1992] ECR II-1, at paragraph 41.

<sup>144</sup> Case 222/86, *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football / Heylens*, [1987] ECR 4097, at 4117.

*Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decisions itself or in a subsequent communication made at their request."*

It is important to stress that the Court of Justice has tended to proceduralise the rationality of the bases for decisions, in order to avoid invading the discretion reserved to the Administration because, as professor Schwarze argues, the judges can assess administrative procedure rigorously to counter-balance the far-reaching discretionary powers of the executive<sup>145</sup>.

The rationale of the protection of subjective rights is further enhanced by the European Code of Good Administrative Behaviour. The Code, proposed by the European Ombudsman in 1999 and approved by the European Parliament in 2001<sup>146</sup>, supplements and gives details on the obligations set out in the Charter. Although not all of the indications it provides are legally binding<sup>147</sup>, the explanations it provides in Article 18 are very illuminating, it reads:

*"1. Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.*

*2. The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning.*

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<sup>145</sup> Jürgen Schwarze, "Judicial Review of European Administrative procedure", 68 *Law and Contemporary problems* (2004), 85-106, at 105.

<sup>146</sup> Code of Good Administrative Behaviour A5-0245/2001. European Parliament resolution on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (C5-0438/2000 2000/2212 (COS))

<sup>147</sup> See for details, Joana Mendes, "Good Administration in EU Law and the European Code of Good Administrative Behaviour", 9/2009 *EUI Law working papers* (2009), 1-13, at 13.

*3. If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore made, the official shall guarantee that he subsequently provides the citizen who expressly requests it with an individual reasoning."*

The reasoning shall thus be individual or, at least, susceptible of being individualised if the citizen so requests. In this sense, the case-law has required that statement of reasons on which a decision adversely affecting a person is based be such as to enable the person concerned to ascertain the matters justifying the measure adopted so that, if necessary, he or she can defend his or her rights<sup>148</sup>. Although the administration does not need to adopt a position on all the arguments relied on by the persons concerned, it does need to state both the particular facts and applicable legal considerations which explain the decision made<sup>149</sup>.

This right appears very closely interconnected with other procedural rights. The right to access to documents is the clearest example because, in consulting the documents that the administration has used regarding one case, a citizen can find the explanations he or she needs concerning his or her case.

Two other rights are connected. Firstly, the right to be heard, examined in the previous section, can be relevant at two points of time. The first one is that the right to a hearing is effective inasmuch as the concerned party is informed of the reasons and the factual background that concerns him or her. The second is that once the decision is made, although the administration does not need to take a position on all the points argued by the concerned party, the arguments of the party would have to be refuted. Secondly, the right to a judicial review, which will be examined in the following

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<sup>148</sup> Case T-44/90 *La Cinq / Commission* [1992] ECR II-1, at paragraph 42, Case T-7/92 *Asia Motor France and Others / Commission* [1993] ECR II-669, paragraph 30

<sup>149</sup> Case T-19/95 *Adia Interim / Commission* [1996] ECR II-321, paragraph 32; and judgment of 12 July 2007 in Case T-250/05 *Evropaïki Dynamiki / Commission*, (not published in the ECR), paragraphs 68 and 69, and T-461/08, *Evropaïki Dynamiki / EIB* [2011] ECR II-06367, at paragraph 107.

section, is also at stake as the grounds given by the public administration shall be used as the parameters of the administration to rule on the validity of the measure.

The two dimension of the obligation to state reasons, the provision of the parameters for the judicial review of the decision and the information of the concerned party could be undermined in the course of a composite procedure. For example, the lack of statement of reasons in the measure taken by a national authority that has been taken into consideration in a decision made at the EU level might disempower the individual with an interest of the relevant knowledge on why the decision was made, as well as the judge that would eventually review the final decision.

### 5.3.2.- *The right to a reasoned decision in composite procedures*

The cases where the obligation of the public administration to state reasons was at stake in the context of composite procedures resemble the cases related to the right to be heard. The subject-matters are similar, inasmuch as it concerns the breach of procedural guarantees in administrative procedures that involved national administrations and the Commission.

One of the frequent schemes of composite procedures is that where the Commission takes an individual decision on the basis of a recommendation or an opinion of the competent national authority, which is normally the one that has handled the case directly with the concerned party. The first question that arises is then to ascertain whether a motivation *per relationem* of the decision taken at the EU level suffices.

Concerning the reduction of financial assistance with regards to structural funds, the Court of Justice initially focused on whether or not the reasons for a Commission's decision to reduce financial assistance were sufficient along the procedure, with no requirement that they would be included in the final decision<sup>150</sup>.

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<sup>150</sup> See for example the judgments of the Court of Justice in Case C-181/90 *Consorgan / Commission* [1992] ECR I-3557, paragraph 18, and Case C-189/90 *Cipeke / Commission* [1992] ECR I-3573, paragraph 18.

That line of reasoning implied that there was no specification on what was the body with the specific duty to make them known to the beneficiary, and the statement of reasons would be considered valid if given by the national authority even though the final decision would be made by the Commission.

In the case *Technische Universität München*<sup>151</sup> the Court of Justice was confronted with the procedural requirement of the statement of reasons in the context of an administrative procedure of several stages. According to the rules in force<sup>152</sup>, some goods were granted an exemption of import duties under certain conditions, notably that no other good of equivalent scientific value. A committee of experts from Member States had to determine whether such requirement was met for the good in question, a microscope. The committee issued a negative assessment and the Commission consequently decided that the microscope could not be imported free of Common Customs Tariff duties<sup>153</sup>. The Commission had followed the advice of the experts but had failed to state the reasons in a sufficient manner, so the Court of Justice determined that the decision was invalid<sup>154</sup>. Unlike in subsequent cases, the Commission had not even referred to or extracted the reasons given at an earlier stage of the procedure.

The CFI would later carry out a more specific analysis of the circumstances in which these statements of reasons had to be laid down. A clear example of an assessment of the validity of the motivation *per relationem* is the *Branco* case<sup>155</sup>. In this case a beneficiary of the ESF brought an action seeking annulment of the Commission decision reducing the financial assistance initially granted. This case is

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<sup>151</sup> Case C-269/90, *TU München / Hauptzollamt München-Mitte* [1991] ECR I-5469. This case is often cited by scholars as a landmark case in the judicial development of the principles of EU administrative law, see Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law*, Hart Publishing (Oxford, 1999), at 10.

<sup>152</sup> Council Regulation (EEC) No 1798/75 of 10 July 1975 on the importation free of Common Customs Tariff duties of educational, scientific and cultural materials (Official Journal 1975 L 184).

<sup>153</sup> Commission Decision 83/348/EEC of 5 July 1983 establishing that the apparatus described as "Jeol-Scanning Electron Microscope, Model JSM-35 C" may not be imported free of Common Customs Tariff duties (OJ 1983 L 188)

<sup>154</sup> C-269/90 *TU München* ..., at paragraphs 26 and 27.

<sup>155</sup> T-85/94, *Branco / Commission*, [1995], ECR II-45. See further in Manuella Verovelli, "Il Procedimento", in Sabino Cassese (ed.), *Corso di Diritto Amministrativo. Vol. 5*, Giuffrè Editore (Milan, 2006), 119-58, at 143. The same consideration were reiterated later in Case T-142/97 *Branco / Commission* [1998] ECR II-3567 and in Case T-114/92 *BEMIM / Commission* [1995] ECR II-147.

thus similar to the ones examined in section 5.2.3. but the ground based on the lack of a statement of reasons was in this case determinant of the outcome.

The case is particularly illuminating because both the applicant and the defendant stated that there was no statement of reasons in the Commission's decision, because, according to the Commission, two parallel bilateral relationships exist, namely the relationship between the Commission and the national authority of the Member State concerned, on the one hand, and the relationship between that national authority and beneficiary, on the other. Since the Commission merely approved the final payment on the basis of the information submitted by the national authority, the Commission is not bound by the obligation to state reasons with regard to the beneficiary<sup>156</sup>. Furthermore, the defendant considered that this ground would only be applicable to the national authority and, therefore, it should be adjudicated at the level of the national jurisdiction<sup>157</sup>.

The CFI analysed to what extent the Commission is bound to the national administration's proposal to reduce financial assistance. It acknowledged that according to the applicable rules<sup>158</sup> the Commission alone has the power to reduce ESF financial assistance, so it must assume, *vis-à-vis* the recipient of ESF assistance, the legal responsibility for the decision by which its assistance is reduced, irrespective of whether or not that reduction was proposed by the national authority concerned<sup>159</sup>.

Since the Commission did not comply with its obligation to state the reasons of its decision, the CFI decided to annul it<sup>160</sup>. However, what is more interesting about this ruling is that the CFI also considered whether or not the motivation provided in the relationship of the applicant and the competent national authority was correct. The CFI admitted that if there was a clear reference in the Commission decision to the measure containing the explanation at the national level, and properly communicated

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<sup>156</sup> T-85/94, *Branco / Commission* ... at paragraphs 12-16.

<sup>157</sup> *Ibid.* at paragraph 18.

<sup>158</sup> Article 6 of the Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund (OJ 1983 L 289, 1).

<sup>159</sup> T-85/94, *Branco / Commission* ... at paragraph 24.

<sup>160</sup> *Ibid.* at paragraph 25.



to the applicant, the final decision would not have been annulled<sup>161</sup>. In conclusion, the CFI considered that the obligation to state reasons is complied with either with the very statement of reasons for the reduction of the grant or by a clear reference to the national administrative act<sup>162</sup>, which implies that validates this motivation *per relationem*.

The same reasoning had been argued by the CFI in the case *Lisrestal*<sup>163</sup>, examined in the section related to the right to be heard. The CFI admitted that the statement of reasons could be a mere reference to the documents produced at the national phase of the procedure. Since it considered that the applicant had not had access to all the information that motivated the final decision (and the proposal made at the national level)<sup>164</sup>, it annulled the decision. The Court of Justice confirmed the ruling of the CFI, although it did not consider the pleas regarding the statement of reasons in detail<sup>165</sup>, it confirmed the CFI's stance that the focus should be placed on whether or not the procedural rights of the concerned person were respected in practice. In this sense, Advocate General La Pergola analyses in this case whether or not the transmission of the right documents containing the motivation had taken place at the national level, that is, in the relationships of the national agency with the beneficiary<sup>166</sup>. If that happened, a mere reference to such pieces of information in the final decision would suffice.

This point of view is expressed more clearly shortly afterwards in *Partex / Commission*<sup>167</sup> where the CFI argued:

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<sup>161</sup> *Ibid.* at paragraph 27.

<sup>162</sup> Manuella Verovelli, "Il Procedimento...", at 146.

<sup>163</sup> Case T-450/93, *Lisrestal and others / Commission* [1994] ECR II-1180.

<sup>164</sup> *Ibid.* at paragraph 50.

<sup>165</sup> Case C-32/95 P *Commission / Lisrestal and Others* [1996] ECR I-5373, at paragraph 45, since the Court of Justice ascertained a breach in the right to be heard, it found it unnecessary to examine the other grounds.

<sup>166</sup> Opinion of Advocate General La Pergola in case Case C-32/95 P *Commission / Lisrestal and Others* [1996] ECR I-5373, at paragraphs 46-48.

<sup>167</sup> Case T-182/96 *Partex / Commission* [1999] ECR II-2673.

*"In a case such as this where the Commission purely and simply confirms the proposal of a Member State to reduce financial assistance initially granted, the Court considers that a Commission decision may be regarded as sufficiently reasoned, for the purposes of Article 190 of the Treaty, either when the decision itself clearly demonstrates the reasons justifying the reduction of the assistance or, if that is not the case, when it refers sufficiently clearly to a measure of the competent national authorities in the Member States concerned in which the latter clearly set out the reasons for such a reduction."*<sup>168</sup>

The incorporation of the statement of reasons for measures of national authorities in the Commission's decision would only be possible when the Commission's decision does not diverge on any particular point from the measures adopted by the national authorities<sup>169</sup>.

This conclusion became clearer when the CFI rejected the pleas of applicants based on the breach of the duty to state reasons when the motivation *per relationem* was considered appropriate. For example, in *Associação Comercial de Aveiro*<sup>170</sup> the CFI assessed again the validity of a Commission's decision reducing financial assistance in the framework of the ESF. As the Commission was simply confirming the proposed reduction by the national authority, the Court analysed whether or not the documents referred in the final decision contained sufficient motivation to ensure the applicant's right of defence. Since the various factors making it possible for the beneficiary to understand the reasons which led the Commission to reduce the amount of the assistance granted by the ESF are set out in the letters and reports cited therein<sup>171</sup>, the CFI rejected the plea. In subsequent cases, the CFI followed the same logic and examined whether or not documents containing the motivation are referred in

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<sup>168</sup> *Ibid.* at paragraph 76.

<sup>169</sup> Case T-72/97 *Proderec / Commission* [1998] ECR II-2847, at paragraph 105.

<sup>170</sup> T-80/00 *Associação Comercial de Aveiro v Commission* [2002] ECR II-2465.

<sup>171</sup> *Ibid.* at paragraph 42.

the Commission's decision and whether such documents ensure the sufficient protection of the position of the applicant<sup>172</sup>.

The CFI seeks then the *effet utile* of the duty to provide reasons as a procedural guarantee of the individual, so he or she has access to the relevant information and can thus refute the facts is appropriate. There is a very close link of this right with the right to be heard, which was particularly visible in *Vlaam Fonds*<sup>173</sup>. In this case, although the applicant was provided with certain information by the national authority at different points of time, the Commission considered other documents of which the applicant was not informed<sup>174</sup>.

In sum, the European judges accept that the statement of reasons consists of a mere reference to documents or measures taken at the national level inasmuch as those allow the concerned party to take cognisance of the reasons for the final decision<sup>175</sup>. This is a practical stance that appears to be protective of the subjective rights of the applicants.

The obligation to give a complete motivation was also a ground in the disputes concerning the antiterrorist legislation. As we explained in previous sections, in this subject-matter, the stance of the European judges was less protective of individual rights as a consequence of peculiar circumstances of the cases.

In the first case *People's Mojahedin Organization of Iran*<sup>176</sup> the plea regarding a breach in the duty to state reasons did not receive a lot of attention by the parties and by the CFI, given the fact that other, more substantial procedural breaches received

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<sup>172</sup> T-199/99 *Sgaravatti Mediterranea / Commission* [2002] ECR II-3731, at paragraph 102, T-46/98 *Council of European Municipalities and Regions / Commission* [2000] ECR II-167, at paragraph 46, and T-387/09 *Applied Microengineering / Commission* [2012] (ECLI:EU:T:2012:501), at paragraph 71.

<sup>173</sup> Case T-102/00, *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap / Commission* [2003] ECR II-2433.

<sup>174</sup> *Ibid.* at paragraph 83.

<sup>175</sup> Case T-72/97 *Proderec / Commission* ... at paragraph 78.

<sup>176</sup> Case T-228/02, *People's Mojahedin Organization of Iran / Council*, [2002] ECR II-4665.

more attention<sup>177</sup>. However, the CFI identified that the lack of a proper statement of reasons was a procedural breach which, together with other infringements, rendered the decision to freeze assets unlawful<sup>178</sup>. However, there are two aspects that in which the CFI showed flexibility. The first is that motivation did not have to appear in full in the decision taken at the EU level. It was enough that the evidence which linked the activities of the concerned party to terrorist acts was made available to the organisation, but this could well take place at the national level<sup>179</sup>. The second is that this motivation could be notified to the concerned party, in so far as possible, either concomitantly with or as soon as possible after the adoption of an initial decision to freeze funds<sup>180</sup>.

The possibility of a statement of reasons that is communicated after the decision is peculiar to the antiterrorist legislation cases, as the judges observed that the effectiveness of the sanctions depends to a large extent in the surprise effect of them. This rationale was reiterated in the later rulings<sup>181</sup>, thus focusing on the assessment of the procedural guarantees at the national level and releasing the EU bodies from any responsibility. In *Sison*<sup>182</sup> for example, the CFI stated that contested acts must satisfy the obligation to state reasons 'taken together', and not necessarily one-by-one or, in this case, only the final decision<sup>183</sup>. Furthermore, it admitted that "the degree of precision of the statement of reasons for a decision must also be weighed against practical realities and the time and technical facilities available for making the decision"<sup>184</sup>.

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<sup>177</sup> *Ibid.* at paragraph 109, namely the infringement to the right to a fair hearing, as already discussed in the previous sections.

<sup>178</sup> *Ibid.* at paragraph 137.

<sup>179</sup> *Ibid.* at paragraph 116.

<sup>180</sup> *Ibid.* at paragraph 137.

<sup>181</sup> T-256/07, *People's Mojahedin Organization of Iran / Council*, [2008] ECR II-3019, at paragraph 52; and T-284/08, *People's Mojahedin Organization of Iran v Council* [2008], ECR II-3487, at paragraph 74.

<sup>182</sup> T-47/03, *Sison / Council* [2007] ECR II-73.

<sup>183</sup> *Ibid.* at paragraph 108.

<sup>184</sup> *Idem.*

In conclusion, the reasoning of the CFI and the Court of Justice is that the statement of reasons must not be explicit in the final decision taken at the EU level, as long as the motivation for an unfavourable act was notified to the concerned party in a previous stage, involving national authorities. The European courts would still keep the competence to assess whether this statement of reasons provided at the national level complies with the standards of legal protection of the individual guaranteed by EU law. For this reason, the unformalistic reasoning of the European judges do not appear to raise so many legal concerns.

Paradoxically, however, the Court of Justice was reluctant to apply the standards of procedural guarantees as provided in 41(2)(c) EChFR to national legislations. A recent ruling is illuminating in this respect. The case *Romeo*<sup>185</sup> concerned the legality of a decision by Italian authorities providing for a reduction in the applicant's pension as a former civil servant of the region of Sicily. The applicant claimed that the duty to state reasons had been breached and invoked principle of European Union law relating to such obligation<sup>186</sup>. The Court of Justice argued that

"it cannot be concluded that the second paragraph of Article 296 TFEU or Article 41(2)(c) of the Charter or indeed other rules of European Union law concerning the obligation to state reasons for acts have been made directly and unconditionally applicable, as such, by (the relevant national rules), so that internal situations and situations relating to European Union law are treated in the same way. Therefore it must be held that, in the present case, there is no clear European Union interest in a uniform interpretation of provisions or concepts taken from European Union law, irrespective of the circumstances in which those provisions or concepts are to apply."<sup>187</sup>

Although this reluctance to apply the rights conferred in the EChFR directly to national legislations is not new in the case-law of the Court of Justice<sup>188</sup>, and there is a

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<sup>185</sup> C-313/12, *Romeo / Regione Siciliana* [2013] (ECLI:EU:C:2013:718).

<sup>186</sup> *Ibid.*, at paragraph 9.

<sup>187</sup> *Ibid.* at paragraph 37.

<sup>188</sup> Case C-482/10, *Cicala / Regione Siciliana* [2011] ECR I-14139.

Declaration in the Treaties denying that the Charter might extend the EU law beyond the powers of the Union<sup>189</sup>, it is worrying that the Court of Justice rejects categorically the assessment of the national rules under the obligation to state reasons. It might be, as the CFI admits in the cases previously referred, that the statement of reasons for a EU decision is found in dealings of a national authority with the concerned party. This means that the EU courts consider that the statement of reasons given by the national authorities in the intermediate steps of the procedure might be sufficient, yet the EU courts lack the competence to rule on the validity or sufficiency of the statement of reasons issued at the national level.

For this reason, it appears to be legally sound to require that the statement of reasons appears at the level of public administration that made the final decision by which the person is concerned. This conclusion would be in line again with the proposal of the research network on EU administrative law (ReNEUAL). In the draft model rules on EU administrative procedures presented in 2014, Article III-29(2) proposes that the duty to state reasons in cases of composite procedures should be respected at all stages, national and European<sup>190</sup>.

### ***5.3.- The right to judicial review in composite procedures***

#### ***5.3.1.- The right to judicial review as a fundamental right and a central element in the configuration of public administration***

It is difficult to overstate the importance of the right to judicial review. The essence of the principle of rule of law and administrative law as a whole lies on the

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<sup>189</sup> Declaration 1: Declaration concerning the Charter of Fundamental Rights of the European Union

...

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.

<sup>190</sup> The Draft model rules were presented in the ReNEUAL conference of 19 May 2014, for which documentation is available at [www.reneual.eu](http://www.reneual.eu).

Book III - Single case decision making. Article III-29:

Duty to state reasons:

"(1) The public authority shall state the reasons for its decisions in a clear, simple and understandable manner. The statement of reasons must be appropriate to the decision and must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the decision in such a way as to enable the parties to the proceedings to ascertain the reasons for the decision and to enable the competent court to exercise its powers of review.

(2) The duty to provide reasons in cases of composite procedures will be shaped by the respective roles of the EU and the Member State in making the decision, as set out in Article III-24."

right of the individual to dispute the decision of the authority before an independent body with the competences to review administrative acts. As judge Marshall put it more elegantly in of the most often cited rulings of North American legal history, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury"<sup>191</sup>.

More than that, one can find, embedded in the emphasis upon judicial review, some of the most basic principles of a democratic society, the gist of the checks and balances of a system of separation of powers, and the main mechanism to ensure the objectivity of the administration and the exclusion of arbitrariness<sup>192</sup>. For this reason, the right to judicial review is a subjective right; but it is also an individual right with far greater legal scope. It is an indispensable right for the understanding of modern administration and central to the constitutional configuration of the State.

In the European Union, the right to judicial review enjoys no less centrality. Advocate General Poiares Maduro argued in the landmark ruling *Kadi* that "the right to effective judicial protection holds a prominent place in the firmament of fundamental rights".<sup>193</sup> The case law of the Court of Justice<sup>194</sup> provides evidence that the right to judicial review is also paramount in how the Court of Justice understands its role and how this right, today listed as a fundamental right, legitimises the structure of the European Union<sup>195</sup>. Scholars remaining attentive to evolution of the case law of the Court of Justice identify a quest for the completeness of legal protection in the

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<sup>191</sup> Supreme Court of the United States, *Marbury / Madison*, 5 US 137, at 163, judgement of 24 February 1803. Accessible at <http://www.ourdocuments.gov/doc.php?flash=false&doc=19&page=transcript>.

<sup>192</sup> Robert Kramer, "The Place and Function of Judicial Review in the Administrative Process", 28 *Forham Law Review* (1959), 1-95, at 6.

<sup>193</sup> Conclusions to Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat Int. Foundation* [2008] ECR I-6351, at paragraph 52.

<sup>194</sup> Starting with the first rulings where the right is enshrined and elaborated, Case 222/84 Johnston [1986] ECR 1651, at paragraph 18; Case 222/86 Heylens [1987] ECR 4097, at paragraph 14.

<sup>195</sup> Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa, and Derrick Wyatt, "European Union Law", Hart Publishing (Oxford, 2011), at 290.



European Union<sup>196</sup>, to which the innovations of the Lisbon Treaty certainly contributed<sup>197</sup>.

In the European context, the understanding of this right relies heavily on the standard of the European Court of Human Rights<sup>198</sup>. Access to the court and the right to an effective remedy are fundamental rights laid down in the European Convention of Human Rights (Articles 6 and 13, respectively). Although the EU is not part of the ECHR<sup>199</sup>, the Court of Justice has long accepted that its standards are a source of inspiration for its stance on the protection of human rights<sup>200</sup>. Taking into account that according to the ECtHR there should be "a remedy in order both to have a claim decided and, if appropriate, to obtain redress"<sup>201</sup>, a system where, due to the complexities of composite procedures, there are situations where the individual is deprived of his or her right to go to court, or have his or her case fully reviewed by a

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<sup>196</sup> Jürgen Bast, "Legal Instruments and Judicial protection", in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law*, Hart Publishing (Oxford, 2010), 345-98, at 368.

<sup>197</sup> Floris de Witte, "The European Judiciary after Lisbon", 15 *Maastricht Journal of European and Comparative Law* (2008), 43 – 55, at 49.

<sup>198</sup> The standard of the ECHR has been an essential point of reference for the Court of Justice, although it has developed autonomous criteria as well, see Robert Schütze, *European Constitutional Law*, Cambridge University Press (Cambridge, 2012), at 414.

<sup>199</sup> It is to be noted that Article 6(2) TEU calls for the accession of the Union to the ECHR, and such accession is already foreseen in Article 59 ECHR as amended by Protocol 14. However, there are many legal and political hindrances to the accession of the EU to the ECHR, as explained for instance in José Martín y Pérez de Nanclares, "The accession of the European Union to the ECHR: more than just a legal issue", 15 *Papeles de Derecho Europeo e Integración Regional* (2013), 1-17. These difficulties have materialised in the negative opinion 2/13 on the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] (ECLI:EU:C:2014:2454) on the draft of the final agreement on the accession of the European Union to the ECHR of 10 June 2013, that can be accessed at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1%282013%29008rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf). This opinion has been subject to a lot of commentaries, often in a critical tone, by legal academics, see José Carlos Fernández Rozas, "La compleja adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos y las secuelas del Dictamen 2/2013 del Tribunal de Justicia", 23 *La Ley Unión Europea* (2014), 40-56; and Casilda Rueda Fernández, "La adhesión de la Unión Europea al Convenio Europeo de Derechos humanos: una difícil obligación por cumplir", 29(1) *Revista Justiça do Direito* (2015), 5-17..

<sup>200</sup> Case 4/73 *Nold* [1974] ECR 491, at paragraph 13; and C-260/89, *ERT* [1991] ECR 2925, at paragraph 41. At the same time, the ECtHR has considered that EU law can be subject to its scrutiny, holding Member States liable for EU law that violates the Convention, see *Matthews / United Kingdom*, 18 February 1999, Application no. 24833/94, Reports of Judgments and Decisions 1999-I.

<sup>201</sup> *Leander / Sweden*, Judgement of 26 March 1987, A 116.

judge, the EU administrative system would fall short of meeting the minimum standards of human right protection provided in the ECHR<sup>202</sup>.

As it is well known, the requirement for higher standards of human right protection by the Court of Justice stem from the pressure exerted by some national supreme and constitutional courts<sup>203</sup>, notably the German *Verfassungsgerichtshof*<sup>204</sup>. This is why the Court of Justice did not initially develop a standard of human rights protection different to Member States<sup>205</sup>, to which it bound itself to respect, and many of its rulings are inspired by the case-law of the ECtHR. Although it can be argued that the Court of Justice has departed from this limitative perspective<sup>206</sup>, in particular since the adoption of the Charter of Fundamental Rights, it is important to underline that the protection of fundamental rights in the EU, among which the right to effective judicial review, was initially developed by the stimuli of external agents in the context of an integration taking place with the predominant focus on economic freedoms.

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<sup>202</sup> The opinion that the EU system of judicial protection does not comply with the requirements of the Convention in terms of right to an effective remedy would not be new. Some commentators had already expressed their doubts in general, not in the particular context of composite procedures. For example, José Manuel Cortés Martín, "On the European Constitutional Crossroads: Towards Easing the Conditions for Standing of Individuals seeking Judicial Review of Community Acts?", 12 *Michigan Journal of International Law* (2003), 121-68, at 154; Henry G. Schermers and Denis F. Waelbroeck, *Judicial Protection in the European Union*, Kluwer Law International (The Hague, 2001), at 272; and Angela Ward, "Access to Justice" in Steve Peers and Angela Ward, *The European Union Charter of Fundamental Rights*, Hart Publishing, (Oxford, 2004), 123-40, at 123..

<sup>203</sup> von Bogdandy, "Founding Principles...", at 45.

<sup>204</sup> The German *Verfassungsgerichtshof* argued in 1974 (BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß) that if a conflict between Community law and the guarantee of fundamental rights under the German Constitution was to arise, the German constitutional rights should prevail over any conflicting norm of EC law, thus rejecting the doctrine of the primacy of Community law, which had first been laid down by the ECJ in the 1964 decision in Case 6/64 Costa / ENEL, [1964] ECR 585 and then extended by it in 1970 in the case 11/70 *Internationale Handelsgesellschaft mbH* [1970] ECR 1125 to cover even the fundamental constitutional norms of the Member States. The reaction of the Court of Justice was to develop a case law of protection of fundamental rights to avoid the crash with national Courts. Later on in 1983, the *Verfassungsgerichtshof* famously stated (BVerfGE 73, 339 2 BvR 197/83 Solange II-decision) that as long as (*solange*) the Community generally ensured an effective protection of fundamental rights similar to the protection of fundamental rights laid down in the German *Grundgesetz* no conflict should arise. See more Elizabeth F. Defeis, "Human Rights and the European Court of Justice: An Appraisal", 31(5) *Fordham International Law Journal* (2007), 1104-17, at 1110.

<sup>205</sup> Philip Alston and Joseph H. H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", 9 *European Journal of International Law* (1998), 658-723, at 661.

<sup>206</sup> Sionaidh Douglas-Scott, "The Court of Justice of the European Union and the European Court of Human Rights after Lisbon", in Sybe de Vries, Ulf Bernitz, Stephen Weatherill (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, Hart Publishing (Oxford, 2013), 153-180; and Andrew T. Williams, "Human Rights and the European Court of Justice: Past and Present Tendencies", *Warwick School of Law Research Paper* No. 2011/06, 1-54, at 42.

For the purposes of our analysis, the focus on the right to judicial review cannot be any less prominent. Indeed, compliance with the right of complete judicial review represents the main challenge for composite procedures. It will be analysed in this section that the main shortcoming of composite procedures appears when the procedural arrangements are such that preclude the judicial control of the decision taken, whether it is because no court finds itself with full competence to review the situation or, in case of more subtle situations, where the competence of the court is limited and results in an unsatisfactory control of the activity of the administration.

### 5.3.2.- *The rule of law in the European Union*

The rule of law is common to all member States constitutional traditions, so it came as no surprise<sup>207</sup> when the European Court of Justice in its landmark case *Les Verts* stated that “the European [Union] is a community based on the rule of law”<sup>208</sup>.

The gist of the rule of law entails that neither the European Union nor Member States can avoid review of the legality of their acts, so there should be –in the words of Dicey<sup>209</sup>, the most prominent classical advocate of the principle of the rule of law–, “an absence of arbitrary power”. Among the founding values of the Union of Article 2

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<sup>207</sup> Although *Les Verts* is generally cited as the ruling that first dealt with the principle of the rule of law in the case-law of the Court of Justice, the Court had referred to the rule of law principle before in Case 101/78 *Granaria* [1979] ECR 623, at paragraph 5: “Thus it follows from the legislative and judicial system established by the Treaty that, although respect for the principle of the rule of law within the Community context entails for persons amenable to Community law the right to challenge the validity of regulations by legal action...”

<sup>208</sup> Case 294/83 *Les Verts / Parliament*, [1986] ECR 1339, at paragraph 23. Judge Lenaerts has said on the ruling that “Its significance is multi-faceted, and it is indeed striking how many fundamental points of EU law can be found in one case”. Koen Lenaerts, “The basic constitutional charter of a community based on the rule of law”, in Miguel Poiares Maduro and Loic Azoulay (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th anniversary of the Rome Treaty*, Hart Publishing, (Oxford, 2010), 295-315, at 295.

<sup>209</sup> It is worth mentioning that according to Dicey the rule of law entailed “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.” See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, Liberty Fund (Indianapolis 1982) (first published in 1897).

TEU<sup>210</sup>, the rule of law principle has the greatest operative relevance from a legal perspective<sup>211</sup>, and appears tightly interlinked to the right of effective judicial protection<sup>212</sup>.

Indeed, when the Court of Justice first used this concept in *Les Verts* it did so in the name of a broad interpretation of the principle of judicial supervision<sup>213</sup>. The opinion delivered by Advocate General Mancini provides evidence that the main concern of that case was to determine the scope of reviewable acts<sup>214</sup>. The Court of Justice has later linked this notion with the protection of fundamental rights, particularly in *UPA*<sup>215</sup>, where it held that the EU is:

“... a community based on the rule of law in which institutions are subject to judicial review of the compatibility of their acts with the Treaty and the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order...”<sup>216</sup>

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<sup>210</sup> Article 2 of the Treaty of the European Union reads: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”

<sup>211</sup> Armin von Bogdandy, “Founding Principles”, Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law*, Hart Publishing (Oxford, 2010), 11-54, at 28.

<sup>212</sup> So much so that at times it would seem that both are part of the same notion, *see* for example Maria Luisa Fernandez Esteban, *The Rule of Law in the European Constitution*, Kluwer Law International (Zuidpoolingel, 1999), at 103, where the author argues that the rule of law finds its best written expression in Article 220 TEC, giving access to the European jurisdiction. Also, in the same vein, it is frequent to find in French literature the link to the right to a judge, *see* Laurent Pech, “The Rule of Law as a Constitutional Principle of the European Union”, 4 *Jean Monnet Working Paper Series* (2009), 1-81, at 15.

<sup>213</sup> Neil Walker, “The Rule of Law and the EU: Necessity’s Mixed Virtue”, in Neil Walker and Gianluigi Palombella (eds.) *Relocating the Rule of Law*, Hart Publishing (Oxford, 2009) 119-138, at 125.

<sup>214</sup> CJEC, Case 294/83 *Les Verts / Parliament*, opinion of AG Mancini delivered on 4 December 1985, [1986] ECR 1341. The notion of rule of law and the counterweight of the power awarded to the State is then understood as a right to a judge, which was the main meaning in French legal literature; *see* Gilbert Guillaume, “Conclusions”, in Joël Rideau (ed.), *Le droit au juge dans l’Union européenne*, Centre de documentation et de recherches européennes (Nice, 1998), 217-24, at 217.

<sup>215</sup> CJEC, Case C-50/00 P *Unión de Pequeños Agricultores / Council*, judgement of 25 July 2002 [2002] ECR I-6677.

<sup>216</sup> *UPA*, at paragraphs 38-39.

Judicial protection and the possibility of review of the acts of the institutions is the main dimension to which the Court of Justice refers when it evokes the rule of law principle<sup>217</sup>. However, looking at the conceptions of this principle in the different European national systems, one can easily conclude that it is not an univocal notion<sup>218</sup>. Professor Craig develops three dimensions of the rule of law principle in Europe<sup>219</sup>:

a) lawful authority, the government must be able to point to some basis for its action that is regarded as valid by the relevant legal system;

b) guiding conduct, the laws should be capable of guiding ones conduct in order that one can plan one's life; and

c) justice and accountable government, governmental action shall conform to precepts of good administration developed through the courts, this being an essential facet of accountable government in a democratic society.

In comparing the European legal systems, three main concepts emerge as the most representative, the English rule of law principle as such, the French *État de droit* and the German *Rechtsstaat*<sup>220</sup>.

In the United Kingdom, where the rule of law principle has the longest tradition<sup>221</sup>, it means essentially that the government must act in accordance with the

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<sup>217</sup> Case C-354/04 P *Gestoras Pro Amnistía and Others / Council* [2007] ECR I-1579, paragraph 51; Case C-355/04 P *Segi and Others / Council* [2007] ECR I-1657, paragraph 51; and C-303/05, *Advocaten voor de Wereld* [2007] ECR I-03633.

<sup>218</sup> Paul Craig, "The Rule of Law", UK House of the Lords Select Committee on the Constitution, Sixth Report, Appendix 5, Session 2006-7, at <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm>. He argues that "[t]here is considerable diversity of opinion as to the meaning of the rule of law and the consequences that do and should follow from breach of the concept", and develops three meaning of the concept

<sup>219</sup> *Ibid.*

<sup>220</sup> See Luc Heuschling, *État de droit, Rechtsstaat, Rule of Law*, Dalloz (Paris, 2002); and Rainer Grote, "Rule of Law, Etat de droit and Rechtsstaat – The Origins of the Different National Traditions and the Prospects for their Convergence in the Light of Recent Constitutional Developments", in Christian Starck (dir.) *Constitutionalism, Universalism and Democracy* Nomos (Baden-Baden, 1999), 271-98.

<sup>221</sup> Jonathan Rose, "The Rule of Law in the Western World: An Overview" 35 *Journal of Social Philosophy* (2004), 457-70, at 458.

law<sup>222</sup>, and that independent courts can review the legality such government action<sup>223</sup>. Unlike in continental Europe and the United States, courts in the United Kingdom do not have the power to annul legislation, which is a peculiar element in the British conception of the rule of law principle<sup>224</sup>. Besides that peculiarity, there is a persistent scholar debate between the formal and substantive conception of the principle. Today, it is generally agreed that it is an overarching constitutional principle of constitutional law which informs the interpretation of all legal norms and may be relied upon by the judiciary to interpret statutes as well as to assess the legality of governmental actions<sup>225</sup>.

In Germany, the concept of *Rechtsstaat* is very large and encompasses both formal principles, such as the principles of legality, legal certainty, proportionality, the prohibition on retroactive laws, and substantive elements, the most important of which is the protection of fundamental rights and human dignity. The essential element of all of these components is that public power is constrained by the law<sup>226</sup>, but this limitation of the public power is regarded mostly from an individual rights-approach<sup>227</sup>. The strong stance of the German courts in general and the *Bundesverfassungsgerichtshof* in particular in the protection of fundamental rights has led to a constitutionalisation of the legal order in the name of the principle of *Rechtsstaat*<sup>228</sup>.

In France, the notion of *État de droit* is in stark contrast to the British idea of rule of law, as its essence lies in the possibility of reviewing legislation on the grounds of its constitutionality<sup>229</sup>. Judged contrary to the French tradition of

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<sup>222</sup> Craig, "The Rule of Law" ... at 98.

<sup>223</sup> Francis G. Jacobs, *The sovereignty of law: The European way* Cambridge University Press (Cambridge, 2007), at 35.

<sup>224</sup> Laurent Pech, "The Rule of Law as a Constitutional Principle of the European Union", Jean Monnet Working Paper Series No. 4/2009, at <http://centers.law.nyu.edu/jeanmonnet/papers/09/090401.pdf>, at 30.

<sup>225</sup> Jacobs, *The sovereignty of law*... at 7.

<sup>226</sup> Pech, "The Rule of Law...", at 33.

<sup>227</sup> Ulrich Karpen, "Rule of Law" in Ulrich Karpen (ed.), *The Constitution of the Federal Republic of Germany* Nomos (Baden-Baden, 1988), 175-81, at 176.

<sup>228</sup> Grote, "Rule of Law, Etat de droit...", at 288.

<sup>229</sup> Pech, "The Rule of Law...", at 37.



parliamentary sovereignty, the power to annul acts of Parliament was initiated by ruling of the Constitutional Council of 1971<sup>230</sup> and, since then, French doctrine has dealt with the concept of *État de droit* extensively<sup>231</sup>. From that moment, scholars have identified a convergence towards the concept of *Rechtsstaat* in the sense of a meta-principle that contains several other related to the submission of the public authority to a judge<sup>232</sup>. The focus of the French conception of the *État de droit* still lies on fundamental rights, because, as Carré de Malberg argued, the *État de droit* is the state-backed legal regime shaped by fundamental liberal rights which places constraints on the *État légal*<sup>233</sup>.

The shared features in the different European countries determine the conception in the European Union as a foundational principle that operates in the form of an umbrella of other formal and substantive components<sup>234</sup>, among which respect from fundamental rights is the most important. Today, the rule of law has become a dominant organizational paradigm of modern constitutional law<sup>235</sup>, both in the legal system of the EU and its Member States.

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<sup>230</sup> Decision no. 71-44 DC, 16 July 1971, striking down an amendment of the law on the contract of association, which can be accessed at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1971/71-44-dc/decision-n-71-44-dc-du-16-juillet-1971.7217.html>

<sup>231</sup> Louis Favoreu, "Le droit constitutionnel, droit de la Constitution et constitution du droit" (1990) 1 *Revue française de droit constitutionnel*, 71-89, at 79.

<sup>232</sup> Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy", 74 *Southern California Law Review* (2001) 1307-52, at 1330.

<sup>233</sup> Raymond Carré de Malberg, *Contribution à la Théorie Générale de l'État*, Sirey (Paris, 1920), at 490, cited by Rosenfeld, "The Rule of Law...", at 1331.

<sup>234</sup> This is why, the Court of Justice is reluctant to use the terms rule of law in its rulings and prefers instead to name the sub-principle which operates as part of it, unlike Advocates General, who tend to use the expression more often. See Rainer Hofmann, "Rechtsstaatsprinzip und Europäisches Gemeinschaftsrecht", in Rainer Hofmann, Joseph Marko, Franz Merli and Ewald Wiederin (eds.), *Rechtsstaatlichkeit in Europa*, C.F. Müller Verlag (Heidelberg, 1996), 321-36, at 321. Some of the cases where the rule of law principle is mentioned and plays a relevant role in the outcome are Order in Case C-2/88 *Zwartveld and Others* [1990] ECR I-3365; Opinion 1/91 [1991] ECR I-6079; Case C-314/91 *Weber* [1993] ECR I-1093; Joined Cases T-222/99, T-327/99 and T-329/99 *Martinez et al. / European Parliament* [2001] ECR II-2823; Case T-177/01 *Jégo-Quéré / Commission* [2002] ECR II-2365; Case C-50/00 P *UPA* [2002] ECR I-6677, see further Eric Carpano, *Etat de droit et droits européens : L'évolution du modèle de l'Etat de droit dans le cadre de l'eupéanisation des systèmes juridiques*, L'Harmattan (Paris, 2005), at 298.

<sup>235</sup> Pech, "The Rule of Law...", at 70.



Despite the different nuances, the rule of law principle in Europe is a notion that encompasses similar values in the different traditions, which can be abridged in the subjection of public power to formal and substantive legal constraints as a protection of the individual against its arbitrary or unlawful use and the existence of an independent and effective judiciary<sup>236</sup>. Under this elementary understanding the rule of law is not only a founding value of the European Union pursuant to Article 2 TEU, but also a condition to the adhesion to the European Union<sup>237</sup>.

In the EU, the rule of law principle has an additional function different to its meaning in EU Member States; it has been used as an instrument to justify on legal grounds the autonomy of European law, and thus support European integration. Beyond effective judicial protection and other constraints of the public authority, the rule of law principle is fundamental for the trajectory taken by European integration<sup>238</sup>. As professor Weiler pointed out<sup>239</sup>, since the early jurisprudence of the Court of Justice, the European judges used this principle as the main tool to give legal support to the European integration and conceive European law as an autonomous system of law, independent not only from national legal systems, but also from political and administrative actors. The Commission also advocated for this view, which set the emphasis on the rules of law principle to ensure the autonomy of the legal system, by evoking the notion of community of law (*Rechtsgemeinschaft*) to describe the old communities instead of the most controversial and disputed notion of statehood<sup>240</sup>.

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<sup>236</sup> Carpano, *Etat de droit et droits européens...* at 23, Heuschling, *État de droit, Rechtsstaat...*, at 662, and von Bogdandy, "Founding Principles...", at 32.

<sup>237</sup> Respect for the rule of law principle has a prominent place among the so-called Copenhagen criteria (established by declaration of the European Council of Copenhagen of June 1993 accessible at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/72921.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf)). See further Geert De Baere, "European Integration and the Rule of Law in Foreign Policy", in Julie Dickson and Pavlos Eleftheriadis (eds.) *Philosophical Foundations of European Union Law*, Oxford University Press (Oxford, 2012), 354-83.

<sup>238</sup> von Bogdandy, "Founding Principles" ... at 28.

<sup>239</sup> Joseph H.H. Weiler. "The Community System: the Dual Character of Supranationalism" 1(1) *Yearbook of European Law* (1981), 267-306; and later, Joseph H.H. Weiler. "The Transformation of Europe" 100(8) *Yale Law Journal* (1991), 2403 - 83.

<sup>240</sup> It was in particular the president of the Commission Walter Hallstein who put forward this notion, see Fernández Esteban, *The rule of law...* at 174 and Walter Hallstein, *Die europäische Gemeinschaft*. Econ (Düsseldorf, 1973), at 31, cited by von Bogdandy, "Founding Principles" ... at 29.

Considering that the gist of the rule of law principle lies precisely on effective systems of judicial control by the public authorities, the design of the different national systems of administrative justice and constitutional justice is essential for the understanding of what is, according to national systems, a proper protection of the right to judicial review. All EU Member States provide their citizens with the right to challenge the acts of public powers before independent courts. However, there is an evolution towards greater judicial control, which has resulted in a progressively enlarged legal standing of individuals and a wider scope of acts that can be subject to review. Moreover, there are different models as to the possibility to challenge acts of Parliament before an ordinary or a constitutional court. These elements are important in the conception of the role and functions of the Court of Justice, as it operates as both an administrative and as a Constitutional court.

Among the different European models of administrative justice, that of Germany is the most protective. Its Basic Law envisages the recourse to a court against the administration as a true subjective right<sup>241</sup>. From its famous *Bundesverfassungsgericht* ruling in *Lüth*<sup>242</sup>, the German conception of fundamental rights as an “objective order of values” that irradiates to the whole legal order has enormous implications for bringing down the burdens for access to justice, from legal standing to the reviewability of acts<sup>243</sup>, which was captured by the German Code of Administrative Court Procedure of 21 January 1960<sup>244</sup>. This conception has largely

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<sup>241</sup> Article 19(4) of Germany’s Constitution reads: “should any person's rights be violated by public authority, recourse to the court is open to him. Insofar as no other jurisdiction has been established, recourse is available to the courts of ordinary jurisdiction”

<sup>242</sup> Judgement of 15 January 1958, BVerfGE 7, 198. I. Senate (1 BvR 400/51) Lüth-decision. A translation into English of the ruling can be found at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=1369](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1369).

<sup>243</sup> Wolfgang Khal “La Administración en el Estado de Derecho de Alemania: entre la tradición y el cambio”, translation by María José Bobes Sánchez, 10 *El Cronista del Estado Social y Democrático de Derecho* (2010), 68-77, at 75.

<sup>244</sup> Verwaltungsgerichtsordnung (VwGO), Code of Administrative Court Procedure in the version of the promulgation of 19 March 1991 Federal Law Gazette I page 686), most recently amended by Article 9 of the Act of 22 December 2010 (Federal Law Gazette I page 2248), available in English at [http://www.gesetze-im-internet.de/englisch\\_vwgo/englisch\\_vwgo.html](http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html).

influenced other European legal systems and, certainly, the case-law of the Court of Justice<sup>245</sup>.

By contrast, the model of administrative justice in France is still that of the *Conseil d'État*. The original duties of the *Conseil d'État* were not exactly to judge but to regulate according to law the activity of public authorities from inside, with limited independence from the executive branch. However it became progressively<sup>246</sup> an independent protector of the respect of the rule of law for the administration<sup>247</sup>, which could compel administrative bodies to execute its rulings<sup>248</sup>.

Finally, there is a third system, that of the United Kingdom which deems that the protection of individual rights against administrative acts shall be the competence of ordinary courts under the Common law system. The system has been overhauled recently<sup>249</sup>, but the central idea remains that the judge has the main role of protecting individual rights within the framework of the clear separation of powers<sup>250</sup>.

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<sup>245</sup> Jacco Bomhoff, "Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing", 9(2) *German law Journal* (2008), 121-124, at 121.

<sup>246</sup> The Conseil d'État has progressively adopted a more protective approach to the rights of the citizens. Two major rulings provide evidence for this evolution. In the *Dame veuve Trompier-Gravier*, opinion of 5 May 1944, 69751, published in 'recueil Lebon' and accessible at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007636208&dateTexte=>, it set the principle of respect of the rights of defence in the administrative procedure before the *Conseil d'État*. In *Didier*, opinion of 3 December 1999 207434, published in 'recueil Lebon' and accessible at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007998657&dateTexte=>, the *Conseil d'État* establishes and details the right to a fair trial and the principle of impartiality before the competent administrative authorities, who shall be independent.

<sup>247</sup> Michel Fromont, *Droit Administratif des États européens*, Themis (Paris, 2006), 14-18. The French *Conseil constitutionnel* stressed the necessity of the independence of the *Conseil d'État*, in particular in its decision n° 80-119 DC, 22 July 1980, at page 46.

<sup>248</sup> Indeed, it was only in the reforms of 1980 and 1995 that it was possible to thought the mechanism of *injection*. Thus the French system of administrative review came later in the standards of individual protection of rights than most other European systems, see Eduardo García de Enterría, "La formación y el desarrollo en Europa de la Jurisdicción Contencioso-Administrativa. Su adquisición definitiva de un *status* de jurisdicción plena y efectiva", 79 *Revista de Administración Pública* (2009) 169-183, at 176; Fromont, *Droit Administratif des États...*, at 355.

<sup>249</sup> Human Rights Act 1998 Chapter 42, of 9th November 1998, accessible at <http://www.legislation.gov.uk/ukpga/1998/42>.

<sup>250</sup> Ricardo Alonso García and Ricardo Torres Muro, "La ley británica de derechos humanos (Human Rights Act 1998): una evolución a conciencia", 105 *Revista Española de Derecho Administrativo* (2002), 5-36, at 35.

Leaving aside the peculiarities of the British model, all European systems of administrative justice can be classified by their proximity to either the German or the French system<sup>251</sup>. Under the subjective conception of *Rechtsschutz*, courts are responsible for establishing the subjective rights of individuals who have been wronged by the administration. Under the objective conception, courts assess the administration's respect for objective legality and the regular legal functioning of the administration<sup>252</sup>.

The implications of these two conceptions result in different rules of legal standing of individuals and scope of control, because the rationale behind judicial control is different. In the first system, the starting point is the citizen and the definition of individual rights, so as to then deduce the consequences imposed on the administration. In the second system, the administration's obligations and constraints are first defined in order to then deduce the rights of individuals<sup>253</sup>.

Both approaches are complementary and can be combined. However, when looking at the gaps in judicial protection of composite procedures, the idea shall be borne in mind that the conceptions of what is a satisfactory protection of individual rights against administrative acts can indeed be different. We will see how the logic of individual rights protection has progressively gained ground in the case-law of the Court of Justice.

The ruling in *Les Verts* cited at the beginning of this section, always appears on the academic works on the topic of the rule of law in the EU because it was the first judicial recognition that the "EC is a community based on the rule of law". But further to that recognition, which only acknowledged a pre-existing reality, it

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<sup>251</sup> The classification of Fromont, *Droit Administratif des États...*, 14-70, is as follows: the French model includes the systems of France, Netherlands, Belgium, Italy and Greece; the German model includes the system of Germany, Austria, Poland and other Central and Easter European countries; there is an intermediate model which includes Spain, Portugal, Sweden and Finland.

<sup>252</sup> Jean-Marie Woehrling, "Judicial Control of Administrative Authorities in Europe: Towards a Common Model", Paper presented at Sigma Workshop in Budva, 5 December 2005, at 3, at <http://www.oecd.org/dataoecd/58/19/35937398.pdf>

<sup>253</sup> *Ibid.*

identified with such 'community' a "complete system of legal remedies", an statement that has proven a lot more controversial than the mention to the rule of law<sup>254</sup>.

In conclusion, the rule of law principle has an unparalleled relevance in the conception of the EU legal system and its institutional and judicial structure. The core element of this principle is that all acts and actions of the public authority are subject to the law and cannot escape judicial review<sup>255</sup>. This power of review includes the review of validity of legislative acts, which in national systems is represented by constitutional judicial review<sup>256</sup>. Procedural arrangements that result in situations where judicial review is not possible or is not satisfactory should attract the attention of the legal academia and the European judiciary. Composite procedures do entail this type of shortcomings, at times not fully realised by the European judges. Hence the relevance of this section which tackles the most pressing challenge of composite procedures.

### 5.3.3.- *The right to judicial review according to the Court of Justice*

In spite of its origins in public international law, it was evident from the beginning that the European communities were not an international organisation in the classical sense. Particularly as regards individuals. The classical paradigm of international law under which only States and international organisations enjoy legal personality and thus legal standing in the international courts<sup>257</sup> does not hold true in the context of the European Union<sup>258</sup>. The Court of Justice stressed in its arch famous

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<sup>254</sup> Alberto Alemanno, "What has been and what could be, thirty years after *Les Verts / European Parliament*", in Miguel Poiares Maduro and Loic Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th anniversary of the Rome Treaty*, Hart Publishing, (Oxford, 2010), 324-32, at 324.

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<sup>255</sup> Vincent Heuze and Jérôme Huet, *Construction européenne et Etat de droit*, Pantheon-Assas (Paris, 2012), at 19.

<sup>256</sup> Pech, "The Rule of Law...", at 45.

<sup>257</sup> This classical restriction of legal personality in international law would have to be nuanced, as there are examples of legal personality of individuals in certain areas of public international law. See for example, Roland Portmann, *Legal Personality in International Law*, Cambridge University Press (Cambridge, 2010), at 31.

<sup>258</sup> Federico Mancini and David T. Keeling, "Democracy and the European Court of Justice", 57(2) *The Modern Law Review* (1994), 175-90, at 186. These commentators argue that the fact that the preamble to the EC Treaty states that the Member States are "determined to lay the foundations of an ever closer

ruling *van Gend en Loos*<sup>259</sup> that special character of the old European Communities when it named Community law a "new legal order" and went on to affirm that "not only imposes obligations on individuals but is also intended to confer upon them right which become part of their legal heritage". From the moment individuals are recognised as subjects of rights, access to justice appears inevitably.

The case-law of the Court of Justice has established a linkage between the very essence of the European Union as a community of law and the right to judicial review of EU acts<sup>260</sup> since the very first judgement when it explored the concept of the rule of law principle in *Les Verts*<sup>261</sup>. The possibility of judicial review is not only the core element of the "community of law based on the rule of law", but also of the effectiveness of EU law. It was at the same time that the Court of Justice established that the principle of effective judicial protection is one of the general principles of EU law<sup>262</sup>.

This is doubtlessly one of the reasons why the scholarly debate on the comprehensiveness of legal protection over EU law has been so abundant. In this vein, there have been numerous critics as to whether the Court of Justice has yet

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union among the peoples of Europe", shows that the Community was not only meant to be concerned with relations between states only.

<sup>259</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1. On the relevance of this recognition of individual rights as an essential part of the doctrine of direct effect see the old work Pierre Pescatore, "The Doctrine of "Direct Effect": An Infant Disease of Community Law", 8 *European Law Review* (1983), 155-77.

<sup>260</sup> Pech, "The Rule of Law...", at 54-55.

<sup>261</sup> Case 294/83 *Les Verts / Parliament*, [1986] ECR 1339, paragraph 23. See further Walker, "The Rule of Law and the EU...", at 125 and Koen Lenaerts, "Case 294/83 Parti écologiste Les Verts v European Parliament. The Basic Constitutional Charter of a Community Based on the Rule of Law", in M. Miguel Poiares Maduro and Louic Azoulay (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing (Oxford and Portland Oregon, 2010), 295-315. The main controversy of the case was to determine whether an act could be reviewed by the Court. The rule of law principle was used as the main argument for a large interpretation of the applicable rules and accept jurisdiction on the case.

<sup>262</sup> Case 222/84 *Johnston / RUC* [1986] ECR 1651, at paragraphs 18 and 19. More details in the relevance of this ruling in Elena Simina Tanasescu, "Rôle des droits fondamentaux dans la constitutionnalisation de l'ordre juridique de l'UE", in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, Asser Press (The Hague, 2013), 207-227, at 219.

achieved a satisfactory system of judicial protection for individuals<sup>263</sup>. Professor De Burca summarized the general view of the academia on the subject when she said that “there are few questions on which the EU law academic world (not to mention the CFI and Advocate Generals of the ECJ) is so united as that the right of individuals to seek judicial review by the ECJ under Article 230 is excessively restrictive and that it undermines respect for the principle of access to justice in the EU”<sup>264</sup>.

The Lisbon Treaty, which has brought about a significant step forward in judicial protection of individuals<sup>265</sup>, but even after those changes the question of whether or not the level of judicial protection in the EU is complete remains unsettled. As the President of the Court, Koen Lenaerts admits, there still remain ‘vestiges of limitations’ placed on the Court of Justice's jurisdiction and powers of review<sup>266</sup>.

The focus of the academia remains in the legal standing of individuals to challenge the validity of EU acts. Notwithstanding this, there are other elements

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<sup>263</sup> Most academic research points out the lack of sufficient access to justice for private parties. Among many others, some of the legal writings that criticize the strict interpretation of the standing conditions for the action for annulment are: Anthony Arnall, “Private Applicants and the Action for Annulment under Article 173 of the EC Treaty”, 32(1) *Common Market Law Review*, (1996), 7-49; Albertina Albor-Llorens, *Private Parties in European Community Law. Challenging Community Measures*, Clarendon Press (Oxford, 1996); Ewa Biernat, “The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community”, Jean Monnet Working Paper Series No. 12/2003, at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/03/031201.pdf>; John A. Usher, “Direct and Individual Concern – An Effective Remedy or a Conventional Solution?”, 28(5) *European Law Review* (2004) 575-600; Xavier Lewis, “Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should it be Fixed?”, 30(5) *Fordham International Law Journal* (2006) 1496-1544; and Laurence W. Gormley, “Judicial review - Advice for the Deaf?”, 29(4) *Fordham International Law Journal* (2006), 655-89. A dissident opinion can be found in Stefan Enchelmaier, “No-One Slips Through the Net? Latest Developments, And Non-Developments, in the European Court of Justice’s Jurisprudence on Art. 230(4) EC”, Institute of European and Comparative Law, University of Oxford, Working Paper 3 (2004), at <http://denning.law.ox.ac.uk/iecl/pdfs/working3enchelmaier.pdf>

<sup>264</sup> Grainne De Burca, “Fundamental Rights and Citizenship”, in Bruno De Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, RSCAS and Academy of European Law (Florence, 2003), 15-49, at 26.

<sup>265</sup> Legal scholarship agrees that the changes brought about by the Treaty of Lisbon in term of judicial protection are very relevant, but some remain sceptical that judicial protection is now fully satisfactory. René Barents, “The Court of Justice after the Treaty of Lisbon” 47(3) *Common Market Law Review* (2010), 709–28; Koen Lenaerts, “Challenges facing the European Court of Justice after the Treaty of Lisbon”, 3 *Revista Romana de Drept European* (2010), 19-39; Vassilos Skouris, “Die Reform der Europäischen Verträge und ihre Anwendung auf die europäische Gerichtsbarkeit” in Wolfgang Durner and Franz-Joseph Peine (eds.) *Reform an Haupt und Gliedern. Verfassungsreform in Deutschland und Europa*, Beck (Munich, 2009), 83-102.

<sup>266</sup> Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law*, Oxford University Press (Oxford, 2014), at 6.



which require careful consideration, such as the scope of reviewable acts, which will be dealt with in subsequent sections. Concerning legal standing, neither many Advocates-General<sup>267</sup> nor the General Court<sup>268</sup> seem to be perfectly aligned with the strict stance of the Court of Justice. This debate transcends the objectives of this dissertation, but there are some questions to be clarified before tackling the specific issues of composite procedures.

When dealing with the so called principle of comprehensive legal protection, the two main pillars on which the Union's judicial architecture rests is the action for annulment but, not less importantly, the preliminary ruling procedure<sup>269</sup>.

#### *Direct challenge: action for annulment*

The main mechanism established by the Treaty to review the legality of EU decisions is the action for annulment. This is the procedure that has received more scholarly attention<sup>270</sup>. Due to the peculiarities of the EU legal order, both administrative and legislative acts are covered by this procedure<sup>271</sup>.

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<sup>267</sup> It is controversial not only because legal doctrine has advocated for more flexible approach, but also among the EU judges there has been public debate about this. Many Advocates-General have favoured in their opinions a more protective view of the right to judicial review of individuals. *See* Lewis, "Standing of Private Plaintiffs...", at 1515-1516. The paradigm of this outlook was the case C-50/00 *Union de Pequeños Agricultores / Council*, opinion of AG Jacobs delivered on 21 March 2002 [2002] ECR I-6677, which the Court of Justice did not follow. For more details on the contribution of Advocate General Jacobs to this topic *see* Takis Tridimas and Sara Poli, "Locus Standi of Individuals under Article 230(4): The Return of Euridice?", in Anthony Arnall, Piet Eeckhout, and Takis Tridimas (eds.), *Making community law: the legacy of Advocate General Francis Jacobs at the European Court of Justice*, Edward Elgar Publishing (Cheltenham, 2008), 77-99.

<sup>268</sup> The General Court, former Court of First Instance, is the judicial body in charge of actions for annulment brought by private parties, according to article 256 and 263 TFEU. However, the less restrictive test applied in Court of First Instance in CFI, Case T-177/01, *Jégo-Quéré & Cie SA / Commission*, judgement of 3 May 2002, [2002] ECR II-02365, was quashed by the Court of Justice; CJEC, Case C-263/02 P *Jégo-Quéré & Cie SA / Commission*, judgement of 1 April 2004, [2004] ECR I-03425, to the general disappointment of the legal academic world, *see* Editorial, "April Shower for Jégo-Quéré", 29(3) *European Law Review* (2004), 287-288.

<sup>269</sup> von Borgandy, "Founding Principles...", at 32.

<sup>270</sup> Mariolina Eliantonio, "Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?", 3(2) *Journal of Politics and Law*, 121-33, at 122; Hofmann, Rowe and Türk, *Administrative Law and Policy* ..., 799.

<sup>271</sup> Albor-Llorens, *Private parties*..., 7. In most member States, there is a clear distinction between the courts which review the validity of administrative acts, normally administrative or other ordinary courts, and the body which reviews the validity of legislative acts, which is normally the Constitutional Court, Constitutional Council or other high body where private parties have limited or no access.

Under the same procedure and, until 1993<sup>272</sup>, under the competence of the same court, action for annulment concentrates what, in national jurisdictions, is considered the domain of administrative justice and constitutional justice, the first corresponding to actions against acts of the public administration -in most cases the Commission-, and the latter corresponding to legislative acts. Although the General Court can be assimilated to a court of administrative review and the Court of Justice as a court of constitutional nature in the context of the action for annulment, the competence of each court does not relate to the legal nature of the act subject to review, but of the category of applicant. As provided for in article 256 TFEU and 51 of the Statute of the Court of Justice, individuals shall apply at the General Court whereas the so-called privileged applicants (Institutions and Member States) shall bring the action directly before the Court of Justice. Thus, since legislative acts cannot be challenged by private parties, the Court of Justice holds the competence to review pieces of legislation, but it can also act as an administrative court when an administrative acts is challenged by an Institution or a Member State.

The distinction between legislative and non-legislative acts –we shall call the latter administrative acts<sup>273</sup>– was not explicit until the Constitutional Treaty<sup>274</sup>. The *nomen iuris* of legislative acts has remained unchanged in the Treaty of Lisbon<sup>275</sup>. The characterisation of legislative acts is merely formal, and depends exclusively on the procedure though which they were adopted.

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<sup>272</sup> Since Council Decision 93/350/ ECSC, EEC, Euratom of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, OJ 1993 L 144, 1-21, two courts were created, the Court of Justice and the Court of First Instance.

<sup>273</sup> The terminology of administrative acts is not commonly found in academic literature on EU law in English, the equivalent terminology has been used in works in other languages where the administrative systems are more familiar with the expression, like in France or in Spain. Denys Simon Flavien Mariatte, and Dominique Ritleng, *Contentieux de l'Union européenne / 1: Annulation, Exception d'illégalité*, Lamy Wolters-Kluwer (Paris, 2011); and Tomás de la Cuadra-Salcedo, “Acto administrativo comunitario”, in Luciano Parejo Alfonso, Tomás de la Cuadra-Salcedo, Ángel Manuel Moreno Molina, and Antonio Estella de Noriega, *Manual de Derecho Administrativo Comunitario*, Editorial Centro de Estudios Ramón Areces (Madrid, 2000), 193-228.

<sup>274</sup> Articles I-33 and I-34 of the Constitutional Treaty establish that European Laws and European Framework Laws shall be considered legislative acts, *see* more details in Alexander Türk, “The Concept of the ‘Legislative’ Act in the Constitutional Treaty”, 11(6) *German Law Journal* (2005), 1555-70, at 1557 and 1569; and Jaques Ziller, *Il nuovo Trattato europeo*, Collana (Bologna, 2007), at 163.

<sup>275</sup> Article 289(3) TFEU.

The fact that an act is ‘legislative’ does not *per se* prevent it from being challenged in the EU Courts by individuals<sup>276</sup>. However, as legislative acts are characterised by the procedure for adoption<sup>277</sup>, they cannot generally be result from a composite procedure. So the attention will be focused on the non-legislative acts.

The first draft of the provision on the action for annulment in the Treaty of Rome<sup>278</sup> limited the scope of acts that could be challenged by individuals. Only Decisions<sup>279</sup> and acts of analogous nature were reviewable<sup>280</sup>, even though a latter case-law of the Court of Justice accepted that other acts<sup>281</sup>, not necessarily Decisions or Decisions in nature, could be challenged. The provisions of primary law remained eloquently unchanged until the Treaty of Lisbon<sup>282</sup>.

The main condition for access to Justice is the twofold requirement of direct and individual concern. On the one hand, direct concern requires that the act must

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<sup>276</sup> *Ibid.*, 1569.

<sup>277</sup> *Ibid.*, 1557.

<sup>278</sup> Article 173(2) of the original EEC Treaty provided: “any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”. The wording of Article 33 of the ECSC Treaty was similar: “The Court shall have jurisdiction over appeals by a member State or by the Council for the annulment of decisions and recommendations of the High Authority on the grounds of lack of legal competence, substantial procedural violations, violation of the Treaty or of any rule of law relating to its application, or abuse of power. ...” More on the origin on these provisions, Juan Manuel de Faramiñán Gilbert, “El contencioso de la Unión Europea. El control de la legalidad en la Unión Europea”, José María Beneyto Pérez, Jerónimo Maíllo González-Orús, Belén Becerril Atienza (eds.) *Tratado de derecho y políticas de la Unión Europea* Vol. 5, Cicur Menor (Aranzadi, 2009), 321-426, at 333.

<sup>279</sup> Decisions are the paradigm of single case acts, as they are defined by primary law as an act binding in its entirety on those to whom it is addressed (article 288(3) TFEU). It can also be addressed to member States or to no specific person, but the provision on the action for annulment is though for decisions addressed to one or several persons.

<sup>280</sup> This left the impression that the drafters permitted individuals to challenge administrative, but not legislative acts, *see* Hofmann, Rowe and Türk, *Administrative Law and Policy ...*, 813, and Christopher Harding, “Private interest in Challenging Community Action”, 5 *European Law Review* (1980), 341-61, at 355.

<sup>281</sup> The Court of Justice ruled that if the applicant could prove that a regulation is a decision of individual concern in essence, but a regulation merely in form, it Could be challenged. Joined Cases 789/79 and 790/79, *Calpak / Commission*, [1980] ECR 1949. Later on it admitted that even a ‘true’ regulation could be challenge if the private party proves it concerns him individually, in Case C-309/89, *Codorniu / Council* [1994] ERC I-1853. *See* for more details on the relevance of this case-law Anthony Arnall, “Private Applicants and the Action for Annulment since Codorniu”, 38(1) *Common Market Law Review* (2001), 7-52.

<sup>282</sup> Article 173(2) EEC became article 230(4) EC after the Maastricht Treaty but, although the paragraphs concerning the standing of privileged applicants varied several times, the paragraph concerning private parties stayed literally the same.

directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules<sup>283</sup>. On the other hand, individual concern entails that persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed<sup>284</sup>.

The latter –by far the most contested condition for standing<sup>285</sup>–, individual concern, requires that either the act is nominally addressed to the applicant or if it affects him or her by reason of certain attributes or circumstances in which they are differentiated from all other persons, *i. e.* ‘as if’ it was addressed to him or her. This rigorous interpretation of the Treaty provisions known as the *Plaumann* test persists to this day<sup>286</sup>. However, provisions of primary law have changed slightly in the Treaty of Lisbon<sup>287</sup>.

There are two sets of changes incorporated in the Treaty of Lisbon. On the one hand, as it had been long awaited by legal scholars<sup>288</sup>, the list of reviewable acts is

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<sup>283</sup> Case C-386/96 P, *Dreyfus / Commission* [1998] ECR I-2309, paragraph 43.

<sup>284</sup> Case 25/62, *Plaumann / Commission*, [1963] ECR 95. On the reason to maintain the *Plaumann* test see Takis Tridimas, "The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?", in Takis Tridimas and Paolisa Nebbia (eds) *European Union Law for the Twenty-First Century: Volume 2. Rethinking the New Legal Order*, Hart Publishing (Oxford and Portland Oregon, 2004), 113-42, at 120.

<sup>285</sup> This condition has even been labelled an almost insurmountable barrier to direct access to justice by Ami Barav, "Direct and Individual Concern: An Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court", 11(2) *Common Market Law Review* (1974), 191-98.

<sup>286</sup> There are examples in which the Court departs from the purest *Plaumann* approach, like *Codorniu*, cited above or Joined Cases T-480 and 483/93, *Antillean Rice / Commission* [1995] ECR II-2305; but the test is still applied with the same rationale, see Biernat, "The *Locus Standi*...", at 10-12.

<sup>287</sup> Article 263(4) reads: "Any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

<sup>288</sup> See Patrick Birkingshaw, "A Constitution for the European Union? A letter from home", 10(1) *European Public Law Review* (2004), 57-84; and Madalina Busuioc, "Accountability, Control and Independence: the Case of European Agencies", 15(5) *European Law Journal* (2009), 599-615.

broadened<sup>289</sup>. Not only acts from Institutions can be subject to judicial review, but also those of other bodies, offices or agencies with legal effects *vis-à-vis* third parties shall fall within the jurisdiction of the European courts, which has major consequences for our purposes, although the Court of Justice had already established an unformalistic approach.

On the other hand, the requirement of individual concern vanishes for “regulatory acts”<sup>290</sup> having direct concern on the applicant and not entailing implementing measures. The General Court of Justice defined them in *Inuit*<sup>291</sup> as “acts of general application apart from legislative acts”<sup>292</sup>, and later in *Microban*<sup>293</sup> it detailed that the more flexible approach in terms of standing required that the act has a legal consequence without member States adopting any measure<sup>294</sup>. Although some authors had hoped for wider definition which would significantly open up the conditions of standing for private parties<sup>295</sup>, the case law of the Court of Justice confirms<sup>296</sup> a relative opening of the standing in the logic of trying to leave no situation where individuals are deprived of their right to effective judicial review<sup>297</sup>.

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<sup>289</sup> Agencies have been included as eventual defendants in the various actions available under European law, *see* Hofmann, Rowe and Türk, *Administrative Law and Policy ...*, 799. However, a little before the entry into force of the Lisbon Treaty the CFI had already accepted jurisdiction on acts emanating from other bodies in Case T-411/06, *Sogelma / European Agency for Reconstruction*, [2008] ECR II-2771; that possibility had been open since firstly concerning the European Investment Bank rulling in Case C-15/00 *Commission / EIB* [2003] ECR I-7281, at paragraph 75.

<sup>290</sup> The definition of a regulatory act was unclear when the Treaty of Lisbon entered into force, *see* Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law. Text and Materials*, Cambridge University Press (Cambridge, 2010), at 414; Hofmann, Rowe and Türk, *Administrative Law and Policy ...*, at 814; Jérôme Roux, “Les actes: un désordre ordonné”, en Denys Simon (dir.), *Le Traité de Lisbonne: oui, non, mais à quoi?*, Europe (Paris, 2008) at. 56; and Jürgen Bast, “Legal Instruments and Judicial Protection”, en Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing (Oxford, 2010), 345-98, at 396. *See* for more details Agne Limante, “Inuit and Microban: ECJ explains notion of ‘regulatory act’”, *King's Student Law Review*, April 2012, at <http://kslr.org.uk/blogs/europeanlaw/2012/04/16/inuit-and-microban-ecj-explains-notion-of-regulatory-act/>

<sup>291</sup> Case T-18/10, *Inuit Tapiriit Kanatami / Parliament*, [2011] ECR II-5599.

<sup>292</sup> *Ibid.*, at paragraph 56.

<sup>293</sup> T-262/10, *Microban International and Microban (Europe) / Commission* [2011] ECR II-7697.

<sup>294</sup> *Ibid.*, at paragraphs 33 to 35.

<sup>295</sup> Melchior Wathelet and Jonathan Wildemeersch, “Recours en annulation: une première interprétation restrictive du droit d’action élargi des particuliers?”, 187 *Journal des tribunaux / droit européen*, (2010), 75-79, and Camilla Buchanan, “Long Awaited Guidance on the Meaning of ‘Regulatory Act’ for Locus Standi Under the Lisbon Treaty”, 1(3) *European Journal of Risk Regulation*, (2012), 115-22.

<sup>296</sup> The first interpretation of the GC has subsequently been endorsed by the Court of Justice in Case C-583/11 P *Inuit Tapiriit Kanatami and Others / Parliament and Council* [2013] (ECLI:EU:C:2013:625),

Additionally, the Treaty on Lisbon tried to improve the system of judicial protection also on the side of national courts, by enshrining the obligation of national courts to provide effective judicial review in article 19 (1) TEU<sup>298</sup>. Some legal scholars have praised this provision from the perspective of the principle of subsidiarity<sup>299</sup>, but others are rather sceptical of its effectiveness<sup>300</sup>.

In conclusion, for most authors there has been an evolution in the last years on the traditionally petrified conception of legal standing at the level of the European judicature. The Treaty of Lisbon has, in a large part, brought about this change but the attitude of the Court of Justice has contributed to this relative opening<sup>301</sup>.

What is remarkable of this evolution is that there is a consciousness of the need to attain and ensure a comprehensive legal protection under EU law<sup>302</sup>, in particular by the Court of Justice. Thus, effective judicial protection goes beyond a general principle informing the EU legal order, to be observed by both Member States

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at paragraph 93, Case C-132/12 P *Stichting Woonpunt e.a. / Commission* [2014] (ECLI:EU:C:2014:100); Case C-248/12 P *Northern Ireland Department of Agriculture and Rural Development / Commission* [2014] (ECLI:EU:C:2014:137); Case C-274/12 P *Telefónica SA / Commission* [2014] (ECLI:EU:C:2013:852), at paragraph 29. *See* more recently T-7/13 *ADEAS / Commission* [2014] (ECLI:EU:T:2014:221).

<sup>297</sup> *See* the conclusion of this limited, yet positive, approach to the case law of the GC in Sergio Alonso de Leon, "Por fin una definición judicial de los "actos reglamentarios" del artículo 263.4 TFUE. Comentario de la jurisprudencia Inuit y Microban", 44 *Revista de Derecho Comunitario Europeo* (2013), 345-61, at 357.

<sup>298</sup> "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

<sup>299</sup> Liz Heffernan, "Effective Judicial Remedies: The Limits of Direct and Indirect Access to the European Community Courts" 5(2) *Law and Practice of International Courts and Tribunals* (2006), 285-304, at 296.

<sup>300</sup> Cornelia Koch, "Locus standi of private applicants Under the EU Constitution: Preserving Gaps in the Protection of Individuals' Right to an Effective Remedy", 30(4) *European Law Review* (2005), 511-27, at 512. She argues referring to the Constitutional Treaty that it would be difficult to expect that Member States change their judicial systems only in compliance with this provision. She also highlights the different national rules to gain access to judicial review.

<sup>301</sup> Linda Maria Ravo, "The role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions" in *Sources of Law and Legal Protection*, Edizioni Università di Trieste (Trieste, 2012), 101-25, at 122; Anthony Arnall, "The principle of effective judicial protection in EU law: an unruly horse", 36(1) *European Law Review* (2011), 51-70. Not all authors would agree, a negative opinion on the attitude of the Court of Justice is found in Costantinos C. Kombos, "The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution?", 17(9) *European Integration online Papers* (2005), at <http://eiop.or.at/eiop/texte/2005-017a.htm>.

<sup>302</sup> von Borgandy, "Founding Principles...", at 32.



and EU institutions, and has rather turned into a peculiar source of self-standing rights which need to be protected and granted effectiveness by the Court itself and by national courts within the field of application of EU law<sup>303</sup>.

*Indirect challenge: Preliminary ruling procedure*

The preliminary ruling procedure is particularly important for composite procedures because it articulates the possibility of a judgement of the Court of Justice in the context of a national decision challenged in the national court. If such national decision puts an end to an administrative procedure where the European level of public administration has intervened, one would be at the presence of the downwards composite procedure. This is the inverse situation from the case of the action for annulment, when the action is brought against the EU decision.

Legal scholarship has traditionally considered two main objectives of the preliminary ruling procedure established in Article 267 TFEU<sup>304</sup>: to ensure the uniformity in the application of EU law and to establish an effective cooperation between the Court of Justice and national courts<sup>305</sup>. However, there is a less evident, but not less important, function of the preliminary ruling procedure which is to complete the system of reviewability of acts in EU law, by relying on the application on EU law by national judges<sup>306</sup>.

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<sup>303</sup> Ravo, "The role of the Principle of Effective...", at 122.

<sup>304</sup> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

<sup>305</sup> Lenaerts, Maselis, and Gutman, *EU Procedural Law...* at 50.

<sup>306</sup> Francis Jacobs, "Enforcing Community Rights and Obligations in National Courts: Striking the Balance", in Julian Lonbay and Andrea Biondi (eds.), *Remedies for Breach of EC Law*, Wiley & Sons (Chichester, 1997), 25-36.



This conception has a twofold consequence. The first is that Member States are under the obligation to provide for remedies for breaches of EU law, and that implies that national courts must ensure the effective application of EU law<sup>307</sup>. In doing so, the Court of Justice developed the principles of equivalence and effectiveness with the aim that the rights of individuals recognised in EU law were duly respected in Member States<sup>308</sup>.

The second is that the Court of Justice has relied on the preliminary ruling procedure to justify its restrictive approach to the standing of individuals before it. The rationale is that implementing measures, on the assumption that they are national, can be challenged before the national courts. In case of doubt about the validity of the general act that was implemented, the national court shall raise a preliminary ruling procedure to the Court of Justice, so there is a complete system of legal remedies and procedures to review all measures adopted by the institutions<sup>309</sup>.

Nevertheless, such reliance on the preliminary ruling procedure to cover the gaps that hinder the completeness of the EU system of justice was criticised even within the Court of Justice. In the opinion of Advocate-General Jacobs in the *UPA*

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<sup>307</sup> John Temple Lang, "The Duties of National Courts under Community Constitutional Law" 22 *European Law Review* (1997), 3-18, at 3. This means that interpreting national law in conformity with Community law, even if this bring about the creation of a remedy where one does not exist as the Court of Justice said in C-213/89, *Factortame I* [1990] ECR I-2433.

<sup>308</sup> Both principles were first established in Case 33/76, *Rewe* [1976] ECR 1989, at paragraph 5 and Case 45/76, *Comet* [1976] ECR 2043, paragraphs 12-16, but later developed to ease enforcement of EU law, see Paul Craig and Grainne de Búrca, *EU Law: text, cases and materials*, Oxford University Press (Oxford, 2003), at 242.

<sup>309</sup> Such was the conclusion reached by the Court of Justice in CJEC, Case *Les Verts*, at paragraph 23. Later it was argued with more details in Case C-50/00 P *Unión de Pequeños Agricultores / Council* [2002] ECR I-6677, at paragraphs 40-41: "...[T]he Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity.

Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection."

This reasoning had been used before in Case 314/85 *Foto-Frost / Hauptzollamt Lübeck-Ost*, [1987] ECR 4199, paragraph 20

case<sup>310</sup> "proceedings before national courts are not capable of guaranteeing that individuals seeking to challenge the validity of Community measures are granted fully effective judicial protection", because 1) national courts are not competent to declare measures of Community law invalid; 2) the principle of effective judicial protection requires that applicants have access to a court which is competent to grant remedies; 3) in some cases it is impossible for individual applicants to challenge Community measures which do not require any acts of implementation by national authorities<sup>311</sup>; and 4) compared to a direct action before the Court of First Instance, proceedings before the national courts present serious practical disadvantages for individual applicants, such as costs and delays<sup>312</sup>.

Advocate-General Jacobs reasoned that access to the Court of Justice via the preliminary ruling procedure is not a remedy available to individual applicants as a matter of right<sup>313</sup>. That is so because even if national courts might be obliged to refer questions may refuse to refer questions, or err in their preliminary assessment of general Community measures<sup>314</sup>. The conditions under which national courts must raise the questions which were laid down in the case *CILFIT*<sup>315</sup>, are controversial and, to many commentators, unevenly respected<sup>316</sup>.

Consequently, the preliminary ruling procedure is not, in the very words of the Court of Justice, a means of redress<sup>317</sup>; and it cannot always be considered fit to

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<sup>310</sup> Opinion in case Case C-50/00 P *Unión de Pequeños Agricultores / Council* [2002] ECR I-6681.

<sup>311</sup> Koch, "*Locus standi* of private ...", at 515. This shortcoming has been overcome by the opening of the standing of individuals in the action for annulment seen in the previous section, see footnote 296.

<sup>312</sup> *Ibid.* at paragraphs 41-44.

<sup>313</sup> *Ibid.* at paragraphs 42.

<sup>314</sup> There has indeed been a number of cases of non-compliance with the obligation to refer imposed onto higher courts, see Hjalte Rasmussen, *The European Court of Justice*, GadJura (Copenhagen, 1998) at 131.

<sup>315</sup> Case 283/81 *CILFIT* [1982] ECR 3415, specially at paragraphs 9-10. There are subsequent cases where some of the assumptions of *CILFIT* were put into question, but not successfully, like C-99/00 *Lyckeskog* [2002] ECR I-4839.

<sup>316</sup> Christiaan Timmermans, "The European Union's judicial system" 41(2) *Common Market Law Review* (2004), 393-405, at 401; and Anthony Arnall, "The Use and Abuse of Article 177 EEC", 52 *Modern Law Review* (1989), 622-39, at 626.

<sup>317</sup> Case C-344/04, *International Air Transport Association / Department for Transport*, judgement of 10 January 2006, [2006] ECR I- 403, paragraphs 28-29; "[a]rticle 234 EC (preliminary ruling procedure) does not constitute a means of redress available to the parties to a case pending before a

guarantee an effective remedy to applicants<sup>318</sup>. Some of the referred cases show that under certain circumstances the Court of Justice is not able to offer an effective remedy to the individual through a judgement in the context of the preliminary ruling procedure.

As a result, the Court of Justice has not been entirely consistent with the proclamation, in the name of *direct effect*<sup>319</sup>, that nationals of Member States are also subject to the EU legal order<sup>320</sup>, since its stance on the rights of those individuals to the European courts is not so straightforward. The idea that the system of legal remedies and procedures is 'complete'<sup>321</sup> stems from the logic of executive federalism discussed in previous chapters, and conceived in term of ideal judicial cooperation and homogeneity of national procedural systems of justice, assumptions that do not necessarily hold true. Hence, reliance on the preliminary ruling is insufficient from a perspective of individual access to justice.

In the case of composite procedures, the complexities of the judicial dialogue between the European and the national judges become more intricate. When the Court of Justice is assessing the validity of a decision taken by the Union's administration, it might be precluded from judging on the validity of the national measure which was a previous step in the administrative procedure. The preliminary ruling procedure is based on the premise that national courts need the help of the Court of Justice to

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national court and therefore the mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a question has been raised within the meaning of Article 234 EC. Accordingly, the fact that the validity of a Community act is contested before a national court is not in itself sufficient to warrant referral of a question to the Court for a preliminary ruling.

The Court has held that courts against whose decisions there is a judicial remedy under national law may examine the validity of a Community act and, if they consider that the arguments put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the act is completely valid. In so doing, they are not calling into question the existence of the Community act.”

<sup>318</sup> See José Manuel Cortés Martín “*Ubi ius, Ibi Remedium? - Locus Standi of Private Applicants under Article 230 (4) EC at a European Constitutional Crossroads*”, 11(3) *Maastricht Journal of European and Comparative Law* (2004), 233-61, at 239; Heffernan, “Effective Judicial Remedies...”, at 288.

<sup>319</sup> The landmark CJEC, Case 26/62 *Van Gend en Loos / Netherlands Inland Revenue Administration*, [1963] *ECR* (English special edition) 1.

<sup>320</sup> Biernat, “The *Locus Standi*...”, at 56.

<sup>321</sup> The claim that the European system of justice is complete stems from the wording of the paramount rulings of the case 294/83 *Les Verts* [1986] *ECR* 1339, at paragraph 23 and Case C-50/00 P *Unión de Pequeños Agricultores / Council* [2002] *ECR* I-6677, at paragraph 40.

interpret, and eventually rule on the validity of, the European Union's law. The initial logic was that this dialogue would not be necessary in a reverse direction, that is, that the Court of Justice would not be in a position to require the interpretation or an assessment of validity of a measure taken at the national level, eventually based on national law.

The emergence of composite procedures challenges such understanding. In a composite procedure the validity of a measure taken at the national level might be relevant, even essential, for the determination of the lawfulness of the decision adopted at the EU level. When ruling on the later, the Court of Justice might find itself bound to accept, as an element outside its power of review, the measure taken at the national level. This possibility leads to a legal deadlock that has become apparent in practice and demands, given the increasing presence of composite procedures, new methods of judicial dialogue inspired perhaps by the preliminary ruling procedure.

#### *5.3.4.- Composite procedures and judicial review: identifying the lacunae*

Academic literature on the subject of access to justice before the European Union courts has mainly focused on the standing of private parties before the European courts. Other aspects have received much less attention<sup>322</sup>. However, the complicated structure of composite procedures raises many other concerns from the perspective of right to judicial review and not only from the point of view of the standing of private applicants. These relate to the difficulties in determining the competence of the court, the doubts about the nature and scope of reviewable acts and finally, also, the restrictions of legal standing. It is worth noting that these gaps in access to justice are very entrenched with each other, but it is convenient for the sake of the systematic treatment of this subject-matter to proceed to analyse them individually.

##### *(A) First gap: determining the competent court*

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<sup>322</sup> Alexander H. Türk, "Judicial Review of Integrated Administration in the EU", in Herwig C. H. Hofmann and Alexander H. Türk (eds.) *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, Edward Elgar Publishing (Cheltenham, 2009), 218-256, at 219.

The administrative decision that results from a composite procedure can be challenged before the national courts or before the European courts. The public administration that issued the act shall be the relevant criterion for determining the suitable judge for reviewing the validity of the act. However, the executive integration referred to in Chapter 2 and the asymmetries of composite procedures and<sup>323</sup>, on the one hand, and the dual-system of courts, on the other, provide evidence that this allocation of competences can be very dysfunctional in practice.

This inconsistency may result in a breach of rights of the individual. The individual is manifestly deprived of the right of judicial review in situations where a decision is not actionable at a national jurisdiction but the EU courts also reject their competence. The situation might be apparently less striking, yet not less harming to the individual rights, when the Court of Justice accepts jurisdiction but refuses to rule on the validity of intermediate measures that constitute the substance of the controversy. The various situations that might arise will be assessed according to the following classification.

### Vertical upwards procedures

The first breach in judicial protection that will be tackled concerns those procedures in which the administrative sequence takes place in part at the national or sub-national level, but the final decision is taken at the European level.

These cases have led to judicial disputes in fields such as agricultural policy. The clearest sample case is *Borelli*<sup>324</sup>. Because this case is the first where the Court of Justice assessed the incoherencies of composite procedures - certainly without mentioning them - in the context of judicial protection, it is worth giving details of the facts of the case.

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<sup>323</sup> What is meant by executive integration is the composite of integrated public administration of a multilevel nature which was described in section 2.1.4.

<sup>324</sup> CJEC, Case C-97/91, *Oleificio Borelli / Commission*, [1992] ECR I-6313.

There was a procedure to grant funds to producers of certain agricultural products on the basis of the Council Regulation 355/77<sup>325</sup>. The Commission was entrusted with the competence to grant funds for investments to certain producers in the context of agricultural production on the basis of the opinion of the national authorities. According to Article 13(3) of the Regulation, the opinion, if unfavourable, was binding upon the Commission, and there are no mechanisms foreseen to review the lawfulness of such opinion. According to the Italian law, it was for the regional authorities to issue such opinion. In this case, aid was requested for the construction of an oil mill. The project did not qualify for aid because in that financial year the number of applications greatly exceeded the financial resources available and because the application could not be held to be a priority one according to the criteria of the national authorities. The Region of Liguria issued an unfavourable opinion which was notified by Italy to the Commission. Consequently, the Commission rejected the application<sup>326</sup>.

The main claim of the applicant was that the unfavourable opinion of the region of Liguria was unlawful because it was adopted in breach of the Regulation due to an erroneous appraisal of the supply contracts concluded with other producers<sup>327</sup>. The Court of Justice declared that it did not have jurisdiction on the validity of the opinion issued by the region of Liguria, even if it acknowledged that it was part of a European decision-making procedure<sup>328</sup>. It went on to determine that it was for the national courts to rule on the lawfulness on the opinion, even offering a preliminary ruling if it was ever raised<sup>329</sup>. The Court of Justice thus declined jurisdiction, and proceeded to analyse the validity of the Commission's decision. As it was the case that the applicant had not contested anything in the proceedings which could be attributed to the Commission's discretionary powers (it was bound by the

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<sup>325</sup> The procedure is established in Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed, OJ 1977 L 51, 1. It is important to note that according to article 13(3) the opinion, if unfavourable, is binding upon the Commission, that cannot review the lawfulness of such opinion.

<sup>326</sup> *Ibid.*, at paragraph 4.

<sup>327</sup> *Ibid.*, at paragraph 7.

<sup>328</sup> *Ibid.*, paragraphs 9-12.

<sup>329</sup> *Ibid.*, paragraph 13.

decision of the national authorities) the Court of Justice dismissed the action, without considering the substance of the claimant's arguments.

The argument put forward by the Court of Justice that it is for the national courts to rule on the lawfulness of the national measure at issue was insufficient because in so doing it was ignoring the Italian administrative system<sup>330</sup> which does not give access to administrative justice in these cases. The opinion provided by the Italian authorities was, under Italian administrative law, merely a preparatory act and not a final decision. For this reason, the Italian courts were unable to review its legality<sup>331</sup>.

In the circumstances of the case, the Court of Justice did not have any tools to provide a different, satisfactory solution. While it could not invade the jurisdiction of national courts to rule on the validity of the national decision, it was also unable to declare the unlawfulness of a Commission's decision that could not, because it was determined by the national measure, have been different. Hence, this case is a good example of why it is necessary *de lege ferenda* to provide for mechanisms which avoid situations where the right of judicial review is breached.

A leading administrative law scholar in Spanish academia, professor García de Enterría, paid special attention to this ruling and argued that it implied an extension of the jurisdiction of the national administrative courts<sup>332</sup>. He understood that the ruling of the Court of Justice entailed an enlargement of the competences of the national administrative courts due to an implicit mandate by EU law to review national administrative acts, disregarding national procedural law if necessary. The position of the Court of Justice placing the burden to tackle the dysfunctionalities of composite procedures as regards its judicial control was one-sided and inadequate. Italian administrative law is not peculiar in limiting access to justice to the final decision in

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<sup>330</sup> Della Cananea, "The European Union's Mixed ...", at 201.

<sup>331</sup> For an opinion of the implications in the Italian administrative system on access to administrative justice *see* Roberto Caranta, "Sull'impugnabilità degli atti endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione", 70 *Il Foro amministrativo* (1994) 752-765.

<sup>332</sup> Eduardo García de Enterría, "La ampliación de competencias de las jurisdicciones contencioso-administrativas por obra del Derecho comunitario. Sentencia Borelli de 3 de diciembre de 1992 y artículo 5 CEE", 78 *Revista Española de Derecho Administrativo* (1993), 297-314.



an administrative procedure. This element is common to other administrative procedural rules of Member States<sup>333</sup> and to the position of the Court of Justice in the context of EU law as well<sup>334</sup>. Furthermore, the hypothetical acceptance of the jurisdiction by the Italian courts would have been insufficient too, because they could not have invalidated the decision of the Commission, which is the one with that had legal effects on the position of the applicant.

It is only natural that the Court of Justice was competent, because the procedure ended with a decision taken by the Commission. The result reached by the Court of Justice was not satisfactory, and would not have complied with a basic standard of protection of the right of judicial review. The applicant in *Borelli* was denied the right to have a decision that affected him fully revised by a competent court. The procedural complexity of composite procedures could only be overcome by the competence of the Court of Justice to interpret national law and national measures, an idea that far exceeds the functions and the conception of the Court of Justice, or to rely on a system of judicial dialogue with national courts in an inverse direction of the preliminary ruling procedure.

The enlargement of the jurisdiction of national administrative courts proposed by the Court of Justice would be a solution as simplistic and blunt as the enlargement of the competence of European courts. It would disregard national rules on administrative procedure and would likewise be restricted as regards the EU elements in the decision-making procedure. What is crucial is to find a co-ordinated approach so that the relevant court has the tools to review the legality of the entire process so individuals cannot be denied access to justice, as was, at that end the case of *Borelli*. The *Borelli* case is so relevant in this research because it provides the clearest evidence of the contradictions brought about by composite procedures and the legal dead-ends to which they lead. However, cases like *Borelli* have existed in other areas,

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<sup>333</sup> As example, article 25 of the Spanish Act 29/1998, of 13 July, on the administrative jurisdiction. The relevant rules allow the judicial appeal regarding decisions which are not final, but only in certain circumstances. Other administrative systems allow for a more general review of acts, although impose some limitations on acts which are not final or do not have direct legal effects, such as Article 40 of the German Code of Administrative Court Procedure (Federal Law Gazette I page 686).

<sup>334</sup> Case 60/81, *IBM / Commission*, [1981] ECR 2640, see with more detail on the reviewability of EU acts in the following section.

in some of which composite procedures are more difficult to identify, and are likely to appear in the future. They are indeed difficult to identify, given the lack of systematic treatment by the case-law.

Another area where similar controversies have arisen is the procedure for the registration of geographical information and designations of origin, which involves both national administrations and the Commission<sup>335</sup>. This procedure was governed by Council Regulation 2081/92<sup>336</sup> at the time when the cases were examined by the CFI. Although there are new rules on this area<sup>337</sup>, the structure of the procedure has remained unchanged. In essence, the application by the interested party is first assessed by a national authority and eventually forwarded to the Commission. If the Commission approves, the application is published, so that other Member States or private parties with opposing interests can intervene<sup>338</sup>. The procedure ends with a Commission decision on the inclusion of a new designation in the corresponding annex. In sum, the procedure tries to find a balance between the protection of legitimate denominations of origin and the avoidance of burdens to trade of foodstuff based on geographical origin, and may give rise to conflicting interests among companies or even Member States<sup>339</sup>.

The first case in this subject-matter is *CSR Pampryl SA*<sup>340</sup>. The Court of First Instance considered an action for annulment brought by a company against the

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<sup>335</sup> See for more details section 4.4.8 in the previous Chapter.

<sup>336</sup> Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, (OJ 1992 L 208, 1–8).

<sup>337</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, 1–29).

<sup>338</sup> In case of dispute the Commission will seek an agreement, if it is not found, the Commission will issue an opinion and submit it to a comitology committee.

<sup>339</sup> See Giacinto della Cananea, “The European Union’s mixed administrative proceedings”, 68 *Law and Contemporary Problems* (2004), 197-218, at 202-3.

<sup>340</sup> Case T-114/99, *CSR Pampryl SA / Commission*, [1999] ECR II-3334. There is an earlier case with similar considerations on Regulation 2081/92 (the procedure to get register based protection of denominations of origin in which the applicant wants to challenge the behaviour of its national authorities), in which although the arguments are less relevant for our purposes, the line of reasoning of the CFI and Court of Justice is already present, namely; T-109/97, *Molkerei Großbraunshain and Bene Nahrungsmittel / Commission* [1998] II-3533, and Case C-447/98 P *Molkerei Grossbraunshain and Bene Nahrungsmittel / Commission* [2000] ECR I-9097.

Commission Regulation<sup>341</sup> that registered the name '*Pays d'Auge*' as a protected designation of origin. The relevant facts were that the applicant had been producing cider including the indication '*Pays d'Auge*'. In 1998, the French Government forwarded to the Commission an application for registration of the name '*Pays d'Auge*' as a protected denomination of origin<sup>342</sup>, which was approved and published by the Commission. Following the applicable procedural rules, there was a period during which individuals could express their opposition through their respective Member States. The applicant sent the competent French authority a statement of objection to the registration<sup>343</sup>; however, the national authority decided not to forward such statement to the Commission because it considered that the objections were not justified. The applicant brought an action unsuccessfully against such decision of the French authority before the *Conseil d'État*<sup>344</sup>.

The main claim of the applicant was that the French authorities had disregarded its statement of objection to the application and forwarded it without such objection to the Commission, which had subsequently proceeded to register it. The applicant contested the legality of the action by the French authorities, and it acknowledged that, from the procedural point of view, it could not make its observations known to the Commission other than by means of the national authorities<sup>345</sup>. The CFI dismissed by an order the action as inadmissible, following the reasoning of the *Borelli* case. It declined jurisdiction to rule on the basis of the lawfulness of a measure adopted by a national authority on the following terms:

"the Community judicature has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority even if the measure in question forms part of a Community decision making procedure, where it clearly follows from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national

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<sup>341</sup> Commission Regulation (EC) 378/1999 of 19 February 1999 supplementing the Annex to Regulation (EC) No. 2400/96 on the entry of certain names in the 'Register of protected designations of origin and protected geographical indications (OJ 1999 L 46, 13).

<sup>342</sup> Case T-114/99, *CSR Pampryl SA*... at paragraph 9.

<sup>343</sup> *Ibid.*, at paragraph 11.

<sup>344</sup> *Ibid.*, at paragraph 13.

<sup>345</sup> *Ibid.*, at paragraphs 36 and 37

authority is binding on the Community decision-taking authority and therefore determines the terms of the Community decision to be adopted."<sup>346</sup>

Although the line of reasoning is the same as in *Borelli*, the CFI no longer insists on the mechanism of recourse to national courts, because it is aware that it is not truly accessible to applicants<sup>347</sup>.

The Court of Justice is aligned with the reasoning of the CFI in the almost simultaneous ruling in *Kühne*<sup>348</sup>, which concerns the same subject matter but where the legal questions are asked through a preliminary reference procedure. This time the controversy refers to the validity of the designation '*Spreewälder Gurken*', as stated in the annex regulation of designations of origin<sup>349</sup>. German authorities accepted the application made by the interested party, even if its gherkins were produced outside the strict area of *Spreewald*, and therefore the Commission proceeded with following phases of the administrative procedure, so the product was eventually accepted with that designation of origin.

The Court of Justice acknowledged that there was a system of division of powers and the assessment of the initial application pertained to the national authorities only<sup>350</sup>. However, following its reasoning in *Borelli* it provided that it is for the national courts to rule on the lawfulness of an application for registration of a designation, but it goes further and determines that they must do so:

“on the same terms as those by which they review any definitive measure adopted by the same national authority which is capable of adversely affecting

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<sup>346</sup> *Ibid.*, at paragraph 57.

<sup>347</sup> Denys Simon, Flavien Mariatte, and Dominique Ritleng, *Contentieux de l'union européenne: Annulation. Exception d'illégalité*, Éditions Lamy (Paris, 2011), at 63.

<sup>348</sup> Case C-269/99, *Kühne / Jütro*, [2001] ECR I-9541. See for more details in the reasoning of the Court in this case Astrid Buhrow, “Zuständigkeitsverteilung und Rechtsschutz bei geographischen Angaben. Besprechung der Entscheidung EuGH vom 6. Dezember 2001, C- 269/99”, 1/2002 *European Law Reporter* (2002), at 36.

<sup>349</sup> Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92, (OJ 1996 L 148 , 1-10).

<sup>350</sup> C-269/99, *Kühne*..., at paragraph 54.

the rights of third parties under Community law, and, consequently, to regard an action brought for that purpose as admissible, even if the domestic rules of procedure do not provide for this in such a case”<sup>351</sup>

The reasoning of the Court lies on the separation of powers of both administrative levels in the procedure and the determination that any controversy arising from a step incumbent upon the national level shall be addressed to the national jurisdiction, regardless of the national procedural laws, but in its reasoning there is a vacuum in the system of effective judicial protection<sup>352</sup>.

In a new ruling concerning the denomination "*foie gras du Sud-Ouest*"<sup>353</sup> the CFI had the opportunity to confirm the case law initiated by the '*Pays d'Auge*' case. The applicant wanted to contest some of the requirements introduced by the French authorities, and it sent a statement of objections to French authorities, who decided not to forward it to the Commission<sup>354</sup>. The Commission published the designation<sup>355</sup>, and the applicant challenged it on the basis of the alleged unlawfulness of the decision of the French authorities not to forward the observations to the Commission.

The CFI reiterates its lack of jurisdiction to assess the legality of a national measure. Since the Commission is bound by the national decision, it cannot see its decision invalidated by a hypothetically unlawful decision by the national authorities<sup>356</sup>. The order of inadmissibility of the CFI is confirmed on appeal by the Court of Justice<sup>357</sup>. It expressly rejects that the reasoning is contrary to the right of

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<sup>351</sup> *Ibid.*, paragraph 58.

<sup>352</sup> Michael Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*, Hart Publishing (Oxford, 2004), at 8.

<sup>353</sup> T-215/00, *La Conquête / Commission* [2001] ECR II-181.

<sup>354</sup> *Ibid.* at paragraphs 12-13.

<sup>355</sup> Commission Regulation (EC) No 1338/2000 of 26 June 2000 supplementing the Annex to Regulation (EC) No 2400/96 on the entry of certain names in the Register of protected designations of origin and protected geographical indications provided for in Regulation No 2081/92 (OJ 2000 L 154, 5).

<sup>356</sup> T-215/00, *La Conquête*..., at paragraphs 49-50.

<sup>357</sup> C-151/01 P, *La Conquête / Commission* [2002] ECR I-1179.

judicial review, because it is to the national court to do such review, irrespective of whether or not national procedural law explicitly allows for it<sup>358</sup>.

The GC confirmed these arguments in more recent cases<sup>359</sup>. More remarkably, this case-law has equally remained unchanged by the Court of Justice in more recent cases like *Bavaria*<sup>360</sup>, which concerned again the rights of opposing third parties in the stage of national application. In particular, this case concerns the validity of the indication “*Bayerisches Bier*”, which could apply to some companies producing beer outside the borders of the region of Bavaria and which the association *Bayerischer Brauerbund* contested on the ground that this indication did not comply with the requirement of being sufficiently specific to a geographic area<sup>361</sup>. Even though these opposing interests refer to the decision of the German authorities forwarded to the Commission, the Court of Justice rejects its competence to adjudicate in this question, leaving it to the national judges like in the previous cases<sup>362</sup>.

The solution of the Court consists on forcing, in the name of the right to judicial control, national courts to accept jurisdiction on certain acts that, according to national procedural laws, are not always reviewable. It is a strong position *pro actione* which, one could argue, the Court has refused to accept in regard of its on jurisdiction in other aspects when interpreting the procedural obstacles to the judicial review of certain acts, specifically, in the context of the action for annulment.

In some cases, the position of the Court of Justice deferring jurisdiction to national courts is sufficient. An example is the recent case *Liivimaa Lihaveis / Eesti-Läti*<sup>363</sup>, where jurisdiction over a decision of a monitoring committee set up by the national authorities of Estonia and Latvia to implement the Commission’s operational

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<sup>358</sup> *Ibid.* at paragraphs 46-47.

<sup>359</sup> T-381/02, *Confédération générale des producteurs de lait de brebis and des industriels de Roquefort / Commission* [2005] II-5337, at paragraph 59; and T-369/03, *Arizona Chemical and Others / Commission* [2005] ECR II-5839, at paragraph 73.

<sup>360</sup> CJEC, Case C-343/07, *Bavaria / Bayerischer Brauerbund*, [2009] ECR I- 5491.

<sup>361</sup> *Ibid.*, at paragraphs 16-23.

<sup>362</sup> *Ibid.*, at paragraph 57.

<sup>363</sup> C-562/12, *Liivimaa Lihaveis / Eesti-Läti* [2014] (ECLI:EU:C:2014:2229).

programme Estonia-Latvia in the context of structural Funds was at stake<sup>364</sup>. The decisions of such committee could not be subject to review by the EU courts, because it is not a body of the Union under Article 263 TFEU. Unlike the previous cases, there is no subsequent administrative decision by the EU authorities on award of the funds in question, so the Court of Justice is right in affirming that national courts are competent<sup>365</sup>. Since an important element of the controversy was also that the applicable (Estonian) national legislation did not foresee that an act of such committee was subject to review by the administrative courts<sup>366</sup>, the Court of Justice reproduces its statement in *Borelli*, citing this time Article 47 ChFR<sup>367</sup>, that "it is for the national courts to rule on the lawfulness of a disputed national measure and to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case"<sup>368</sup>. In this case, as there is no EU administrative act involved the case-law of the Court of Justice does not raise any legal concerns, and the applicability of the fundamental right to judicial review in the context of implementation of EU law provides a satisfactory solution.

Another field which gives rise to these concerns and from which some conclusions can be drawn is the field of competition law. Co-operation between European and national authorities in the investigations is frequent, so the possibility exists that lawfulness of certain measures carried out by the national authorities within a procedure pursued by the Commission is contested before the European courts. Composite procedures exist in several areas of competition law<sup>369</sup>, but the area of merger control, to which some of the controversies explained below belong. In the area of merger control the Commission holds the monopoly on the authorisation of mergers falling under the scope of the EU law, there are sectors like media or prudential rules, where Member States can invoke legitimate public interests which

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<sup>364</sup> Commission decision C (2007) 6603 final of 21 December 2007 based on Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) 1783/1999 (OJ 2006 L 210, 1-11).

<sup>365</sup> C-562/12, *Liivimaa Lihaveis...*, at paragraph 52.

<sup>366</sup> *Ibid.*, at paragraph 57.

<sup>367</sup> *Ibid.*, at paragraphs 60 and 74.

<sup>368</sup> *Ibid.*, at paragraph 75.

<sup>369</sup> See for a general overview of composite procedures in the area of competition law, Hans Christian Röhl, "Procedures in the European Composite Administration", in Javier Barnes (ed.) *Transformación del Procedimiento Administrativo*, Editorial del Derecho Global (Sevilla, 2008), 75-96, at 86.



must be taken into consideration by the Commission<sup>370</sup>. In the field of antitrust law, the new rules also imply enhanced level of cooperation<sup>371</sup> that can result in some cases in composite procedures<sup>372</sup>.

The first case that can be cited as an example is *Kesko*<sup>373</sup>, in which a company challenged a Commission decision declaring a concentration incompatible with European competition rules. The essential facts were that the Finnish Office of Free Competition had forwarded to the Commission a request to examine an acquisition of a company by the plaintiff<sup>374</sup>. The applicant claimed that the request forwarded by the Finnish authorities was unlawful because the entity in question did not have legal competence to send such request<sup>375</sup>. The Court of Justice declined jurisdiction on the validity of a measure adopted by a national authority<sup>376</sup>, even though the national administrative courts had previously declined to adjudicate on the substance of the claim and dismissed the action as inadmissible<sup>377</sup>.

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<sup>370</sup> See for example Article 21, paragraphs 2, 3 and 4 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, 1-22), which reads: " 2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.  
(...)

4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.  
Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph."

<sup>371</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, 1-25), see for an analysis of the elements of cooperation of the rules inasmuch as national organs take part in the decision-making process of the Commission, Alec Burnside and Helen Crossley "Cooperation in Competition: a new era", 30(2) *European Law Review* (2005), 234-60.

<sup>372</sup> Röhl, "Procedures in the European Composite...", at 90.

<sup>373</sup> Case T-22/97, *Kesko Oy / Commission*, [1999] ECR II-3779.

<sup>374</sup> *Ibid.*, at paragraph 8, the request was based on article 22(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, 1-12).

<sup>375</sup> *Ibid.*, paragraph 68, it must be stressed that only the State Council is competent, pursuant to Article 40:1 of the Finnish Constitution, to perform the functions assigned to the Member States by Community law, in the absence of any specific conferment of such powers on another body by express statutory provision, as was the case.

<sup>376</sup> *Ibid.*, paragraph 83.

<sup>377</sup> *Ibid.*, paragraph 13. Judgement of the Supreme Administrative court of Finland of 1 October 1996.

A similar reasoning is found in *Dalmine*<sup>378</sup>, this time in the context of antitrust law. In this case, the transmission of incriminatory information by the national authorities to the Commission was contested. According to the claimant, the evidence had been obtained in an investigation conducted for a purpose different than that of the case in question, and such action could entail a violation of the rights of the investigated company in accordance with the case-law of the Court of Justice<sup>379</sup>. However, the CFI still declined jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority in application of national criminal law<sup>380</sup>, even if that information was essential for determining the liability of the company. That reasoning was later confirmed by the Court of Justice on appeal<sup>381</sup>.

From this case-law one can conclude that there is a remarkable asymmetry. While Competition Law procedures entail a very intense and loyal co-operation between European and national authorities, the European jurisdiction refuses any consideration on the assessment of measures adopted by national authorities, and simply redirect any controversy on those measures to the national courts, which not always is either admissible under internal procedural rules or pertinent to satisfy the claim of the parties. While in some cases the solution offered by the Court of Justice as a compromise between the right of judicial review and a strict stance on its own jurisdiction may be satisfactory, in other cases we have seen there is an evident *lacuna* in the protection of individual rights. This gap entails a real violation of rights of judicial access that would have to be addressed with a completely new approach. Specific provisions of EU law establishing a clear allocation of judicial competences for composite procedures appears necessary. Furthermore, the possibility of the EU courts to incorporate an assessment of the validity of acts and measures taken at the national level through a mechanism of judicial cooperation analogous to the preliminary ruling procedure should be considered.

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<sup>378</sup>Case T-50/00, *Dalmine / Commission* [2004] ECR II-2405.

<sup>379</sup> Case C-67/91, *Asociación Española de Banca Privada / Commission*, [1992] ECR I-4785, at paragraph 35.

<sup>380</sup> Case T-50/00, *Dalmine...*, at paragraph 86.

<sup>381</sup> C-407/04 P, *Dalmine / Commission* [2007] ECR I-829.

### Vertical downwards procedures.

This second set of cases refers to the reviewability of the acts or decisions made by European authorities which contribute to the final decision taken at the national level. One could arguably state that a solution to these kind of situations is already foreseen by EU law, as national courts are enabled to raise a preliminary ruling procedure to determine the interpretation or the validity of EU rules. However, practice shows that some situations might lead, here too, to a lack of determination of a competent court.

The paradigm of this situation and the first case to be analysed is *van Parys*<sup>382</sup>. According to the European rules in force at that time<sup>383</sup>, the import licences for certain agricultural products had to be issued by national authorities on the basis of the allocation of quantities done by the Commission. One of the companies was denied a licence in Belgium following the limitations introduced by the Commission, and it decided to bring an action for annulment before the CFI. Its main argument was that national authorities had confined themselves to dealing with applications of operators following the instructions of the Commission, which were binding upon them and were the essential reason for the denial of the licence<sup>384</sup>.

The CFI took a formalistic approach to the admissibility of the action and found that the Commission's measure was not a decision within the scope of reviewability of actions for annulment, because indeed it had not been addressed to the applicant. As a consequence, the decision of the Belgian authorities could not be subject to review by the European courts<sup>385</sup> and the CFI dismissed the action as inadmissible.

This case is especially illuminating because the action was also brought in the national jurisdiction, where the Belgian Council of State raised a reference for a

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<sup>382</sup> T-160/98, *Van Parys / Commission* [2002] ECR II-235.

<sup>383</sup> Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas, (OJ 1993 L 47, 1).

<sup>384</sup> T-160/98, *Van Parys*..., at paragraph 25.

<sup>385</sup> *Ibid.*, at paragraph 70.

preliminary ruling<sup>386</sup>, which gave the opportunity to assess the interpretation of the Court of Justice, and of the national courts, on the issue. On the substance, the controversy relates to the direct effect of WTO rules in the EU legal order. The controversy reveals that the system of the two jurisdictions, national and European, could in this case effectively review a measure that affected the individual rights of a party, unlike the set of cases referred to in the previous section. Such effectiveness of the right of judicial review was possible because the preliminary reference is possible in this downwards procedures, though not vice versa.

However, such satisfactory solution cannot always be reached in every downwards procedure. *Tillack*<sup>387</sup> is the sample case of a situation where there was a breach in the right of judicial review as a result of the two courts denying jurisdiction. This case can be identified as the inverse sample-case to *Borelli*, as it leads to the same kind of judicial deadlock in which the right of an individual to have his case reviewed by a court is denied. For the analysis carried out here, there are some clarifications that must be pointed out. In *Tillack* not only an administrative procedure (that carried out by OLAF) is involved, but there are aspects of criminal procedures too that render the case more peculiar, with some aspects that are not directly applicable to composite procedures.

The essential facts are the following. The Commission's anti-fraud office (OLAF) claimed that an individual had committed a crime, so it informed the Belgian prosecutor of the accusations<sup>388</sup>. The Belgian authorities raided his domicile and seized his belongings. Mr Tillack brought an action for damages in the Belgian courts, but the action was rejected on the grounds that the national judge could not rule on the

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<sup>386</sup> C-377/02, *Van Parys / BIRB*, [2005] ECR I-1499.

<sup>387</sup> T-193/04, *Tillack / Commission*, [2006] ECR II-3995; see for further details, Jill Wakefield, "Case T-193/04, Hans-Martin Tillack v. Commission", 45(1) *Common market law review*, (2008), 199-221; and Paul Craig and Gráinne de Búrca, *The evolution of EU law*, Oxford University Press (Oxford, 2011), at 451, 452.

<sup>388</sup> This information was forwarded on the basis of article 10(2) of Regulation (EC) 1073/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OJ 1999 L 136, 1-7).

validity of the information provided by the European authorities, which bound the Belgian authorities under the principle of loyal cooperation<sup>389</sup>.

In parallel, the applicant brought an action for annulment of the request by OLAF for information from the Belgian authorities, as well as an action for damages before the CFI. The CFI argued that since the forwarding of information pursuant to OLAF was not a legally binding measure, and because of that it could not be regarded as a measure capable of changing the applicant's legal position<sup>390</sup>, a consideration that was contrary to the Belgian judges'. As a result, the CFI dismissed the action brought by Mr. Tillack as inadmissible on the grounds that the measure of OLAF was not reviewable, and that national authorities remained free, in the context of their own powers, to assess the content and significance of that information forwarded and, thus, the action to be taken<sup>391</sup>. The ruling was appealed but the Court of Justice agreed with the findings of the CFI<sup>392</sup>, rejecting the appellant's claim that his right of effective judicial protection had been breached.

There was a different understanding by the European and national judges as for the 'binding' character of OLAF's decision, and the consequence of such divergence was that both national and European courts had therefore refused to hear his case. The applicant took the case further and challenged the ruling before the European Court of Human Rights<sup>393</sup>. The ECtHR examined the case in light, mainly, of the freedom of expression provided for in article 10 of the European Convention of Human Rights, but the aspects related to access to justice were also assessed<sup>394</sup>. Even though the judgement does not rule explicitly on the activities of the OLAF, the Commission or the judgement of the CFI, it does indirectly address the question<sup>395</sup> by arguing that no judicial protection has been offered. It declares a violation of rights from Belgium, although this indeed results from the lack of jurisdiction of the EU

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<sup>389</sup> Case T-193/04, *Tillack*..., at paragraph 30.

<sup>390</sup> *Ibid.*, at paragraphs 81.

<sup>391</sup> *Ibid.*, at paragraphs 70 and 122.

<sup>392</sup> Case C-521/04 P, *Tillack / Commission* [2005] ECR I-3105.

<sup>393</sup> ECtHR App. 20477/05, *Tillack / Belgium*, judgement of 27 November 2007.

<sup>394</sup> *Ibid.*, at paragraphs 68-72.

<sup>395</sup> Hofmann, "Composite decision making...", at 157.

courts too. This case has certain peculiarities that are not common to the standard of composite procedures that is relevant for our purposes, notably, the fact that it involved criminal law, which means that the sensitivity for human rights is greater. However, the case is particularly eloquent for our purposes too because the lack of mechanisms of coordination between European and national judges resulted in both judicial systems rejecting jurisdiction to adjudicate on the case result on a breach of fundamental rights.

In addition to these two sample cases, there is a number of cases where the inconsistency in the approach to judicial review in composite procedures generated gaps in access to justice in various areas. The proceedings that will be summarized in this section involve acts of transmission of information by the Commission to the national authorities that were not considered reviewable. This case-law is to a great extent linked with that on the concept of reviewable acts, which will be dealt with later on. However, it is worth noting that the interpretation of the European courts of those acts of transmission of information, not giving access to judicial review, entails a gap in judicial protection due to lack of a competent court.

An area where this question has been problematic is customs rules. The first ruling of this case-law is *Sucrimex*<sup>396</sup>. The facts of this case relate to several export companies which had requested a refund. According to the applicable rules at the time<sup>397</sup>, the decision on the funds lies within the powers of the national authorities, but the Commission can issue an opinion. In the specific case at stake, the position taken by the Commission on the loss of some necessary certificates was essential in for the outcome reached by the national decision, even though in the word of the Court of Justice, it was not binding<sup>398</sup>. In spite of the circumstances, the Court of Justice stated that:

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<sup>396</sup> 133/79, *Sucrimex / Commission*, judgement of 27 March 1980 [1980] ECR 1300.

<sup>397</sup> Regulation no 193/75 of the commission of 17 January 1975 laying down common detailed rules for the application of the system of import and export licences and advanced fixing certificates for agricultural products (OJ 1975 L 25 , 10).

<sup>398</sup> Lenaerts, Maselis and Gutman, *EU Procedural Law...*, at 260.

“export refunds is a matter for the national bodies appointed for this purpose and that the Commission has no power to take decisions on their interpretation but may only express its opinion which is not binding upon the national authorities.”<sup>399</sup>

The problem with this reasoning lies on the fact that a decision that the national jurisdictions might not be able to review the substance of the national decision, as it relied exclusively on the information provided by the Commission.

Similar cases followed in the same area. In *Emeralds Meats*<sup>400</sup>, the non-binding character of the communications between the Commission and the national authorities in the context of the import of meats<sup>401</sup> led to the inadmissibility of the action<sup>402</sup>, even though it could be proved that the content of the communication determined the final decision reached. More recently, in *Thomson Sales Europe*<sup>403</sup> the CFI reiterates that a communication of the Commission expressing an opinion in an area where it does not have the power to take the final decision cannot be subject to the jurisdiction of the EU courts<sup>404</sup>, even in case the national authority expressly accepts it<sup>405</sup>. Other cases in the area of customs confirm the case-law of the CFI and the Court of Justice<sup>406</sup>.

The same reasoning has been applied by the EU courts in the area of structural funds. A remarkable case concerning agricultural funds is *Oleifici Italiani*<sup>407</sup>. The case concerns the payment of agricultural funds to some Italian olive oil companies. The composition of their products was disputed and the analysis concluded that the olive

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<sup>399</sup> *Ibid.*, at paragraph 16.

<sup>400</sup> Joined Cases C-66/91 and C-66/91 R, *Emeralds Meats Ltd/ Commission*, [1991] ECR I-1144.

<sup>401</sup> Council Regulation (EEC) No 3838/90 of 20 December 1990 opening and providing for the administration of a Community tariff quota for meat of bovine animals, frozen, (OJ 1990 L 367, 3).

<sup>402</sup> C-66/91 and C-66/91, *Emeralds Meats Ltd...*, at paragraph 26

<sup>403</sup> Joined Cases T-225/07 and T-364/07, *Thomson Sales Europe / Commission*, [2009] ECR II-176.

<sup>404</sup> *Ibid.*, at paragraph 186.

<sup>405</sup> *Ibid.*, at paragraph 187.

<sup>406</sup> Case C-147/96 *Netherlands / Commission*, [2000] ECR I-4728, at paragraph 25; Case T-55/05, *Rijn Schelde Mondia France/Commission*, (not published in the ECR) at paragraph 48, Case T-210/07, *RSA Security Ireland Ltd / Commission*, [2008] ECR II-302, at paragraph 29.

<sup>407</sup> T-54/96, *Oleifici Italiani SpA / Commission* [1998] ECR II-3380, at paragraph 51



oil for which they claimed the funds did not meet the requirements for the allocation of agricultural funds<sup>408</sup>. Following the monitoring activities, the Commission sent a letter to the Italian authorities proposing to block the payment of funds to the applicants, which the Italian authorities did<sup>409</sup>.

Even if there was, given the circumstances, an obligation for the national authorities to block undue payments deriving directly from the applicable rules<sup>410</sup>, the CFI considered that the Member State was not bound by the letter, which did not in itself have a decisional nature<sup>411</sup>, even though it was proved that it was essential in practice for the outcome of the procedure. For this reason, the CFI dismisses the action.

Other cases in the area of agricultural funds<sup>412</sup> and, more generally, European funds<sup>413</sup> confirm that the approach of the Court of Justice is to reject admissibility of actions against communications of the Commission that, not having legally binding character, are in the circumstances of the case an essential element for the decision taken at the national level.

These arguments by the Court of Justice on the non-reviewability of the mere acts of transmission of information without binding effects are repeated in many other rulings in different types of procedures. Most clearly, the Court of Justice has consistently held within actions for annulment that a written expression of opinion cannot constitute a decision of such a nature as to form the basis of such action. Thus

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<sup>408</sup> *Ibid.*, at paragraphs 12-30.

<sup>409</sup> *Ibid.* at paragraph 29.

<sup>410</sup> Article 8 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), 218).

<sup>411</sup> T-54/96, *Oleifici...*, at paragraph 51.

<sup>412</sup> Case C-151/88, *Italy / Commission*, [1989] ECR 1256, paragraph 22; C-50/90, *Sunzest / Commission*, [1991] ECR I-2918, at paragraph 13; T-166/98, *Cantina Sociale / Commission*, [2004] ECR II-3998, at paragraph 102; and T-393/06, *Makhteshim-Agan / Commission*, [2008] ECR II-293, at paragraph 41.

<sup>413</sup> C-308/95, *Netherlands / Commission*, [1999] ECR I-6533, paragraph 27; T-54/96, *Oleifici Italiani SpA / Commission* [1998] ECR II-3380, at paragraph 51; and Joined Cases T-121/96 and T-151/96, *MAAS / Commission*, [1997] ECR II-1357, at paragraph 42.

has been ruled in cases of competition law<sup>414</sup>, and authorisation of certain products such as medicines<sup>415</sup> and dangerous substances<sup>416</sup>.

The same line of reasoning applies in the context of actions for damages. The EU courts have also dismissed numerous actions for damages on the ground that the acts of transmission of information by the European institutions were not binding. For instance, in the cited case *Oleifici Italiani*, in which the plaintiff applied both for annulment of an act of the Commission and for damages<sup>417</sup>, the CFI considered that since the Commission has no power to take decisions and may only express their opinion, which is not binding<sup>418</sup>, it concluded that there is no causal link between the conduct of the Commission and the alleged damage. Furthermore, even if the damage could be imputed to the national authorities, the European Court cannot award those damages<sup>419</sup>. The same reasoning applied in similar cases like *Alessandrini and others*<sup>420</sup> or, more recently, *Ilademporiki*<sup>421</sup> and *Bowland Dairy Products*<sup>422</sup>. If the act by the Commission is not binding, then the connection with the national decision cannot be such as to generate a right for compensation from the European Institutions<sup>423</sup>.

Finally, in preliminary ruling procedures, the Court of Justice has been very cautious when assessing the Commission opinions to national authorities if they were not binding, even if its input was essential in the outcome of the national procedure.

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<sup>414</sup> T-114/89, *Vereniging van Nederlandse Ziekenfondsen / Commission*, [1990] ECR II-827, at paragraph 68; and T-57/07, *E.ON / Commission*, [2009] ECR II-132, paragraph 31.

<sup>415</sup> T-116/89, *Vereniging Prodifarma / Commission*, [1990] ECR II-844, at paragraph 63.

<sup>416</sup> T-234/04, *Netherlands / Commission*, [2007] ECR II-4592.

<sup>417</sup> Specifically on considerations related to the action for damages, see Alina Kaczorowska, *European Union Law*, Routledge-Cavendish (Oxon, 2008), at 466.

<sup>418</sup> T-54/96, *Oleifici...*, at paragraphs 51 and 61.

<sup>419</sup> *Ibid.*, at paragraph 67.

<sup>420</sup> Joined Cases T-93/00 and T-46/01, *Alessandrini and others / Commission*, [2003] ECR II-1639, at paragraph 61.

<sup>421</sup> Case T-92/06 *Lademporiki and Parousis & Sia / Commission*, [2006] (not published in the ECR), at paragraph 26.

<sup>422</sup> T-212/06, *Bowland Dairy Products / Commission*, [2009] ECR II-4073, at paragraph 41.

<sup>423</sup> C-55/90 *Cato / Commission*, [1992] ECR I-2564, at paragraphs 25-29; see on the possibility of joint liability, see Hofmann, Rowe, and Türk, *Administrative Law and Policy...*, at 878.

An interesting case in this respect is *Eurico*<sup>424</sup>. In the context of a food-aid programme carried out in a third country, the applicant claimed damages resulting from the actions performed through cooperation of the Commission and a national agency. The Court of Justice stated that damages resulting from the implementation of food-aid operation, even when the communications of the Commission indicated the actions to follow and the Commission kept supervisory powers on the behaviour of the national agency<sup>425</sup>, the liability could not be attributed to the Commission because, in the view of the Court of Justice, "the expression of those opinions forms part of the internal cooperation between the commission and the national bodies responsible for applying community rules in that field and that cooperation cannot make the community liable to individuals"<sup>426</sup>. Similarly, in *Ellinika Dimitriaka*<sup>427</sup>, the Court of Justice ruled that the Greek authorities were ultimately responsible for setting the maximum levels of radioactivity of products to be exported, even if the Commission had given a precise interpretation of the rules to be applied in the case<sup>428</sup>.

After looking at the relevant case-law of the Court of Justice, it can be concluded that in downwards composite procedures it is possible that access to justice will not be satisfactory. The plain rejection of jurisdiction over certain acts adopted by the European bodies, on the grounds that these acts are not final or that they are not binding, may in some cases entail a gap in the right to judicial review. Namely, considering that the measure by the European level of decision making cannot be challenged at the European Courts and that the final decision, taken at the national level of administration, was determined by that EU measure, there might be a gap in judicial protection, if the national courts cannot rule on the validity of such acts, *i. e.* the decisions adopted at the EU level.

The case-law of the Court of Justice based on the "binding effects" of the act or transmission of information has at times been too strict and insensitive of the factual realities where national authorities rely fully on the information provided by

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<sup>424</sup> Case 109/83, *Eurico / Commission*, [1983] ECR 3582.

<sup>425</sup> *Ibid.*, at paragraph 20.

<sup>426</sup> *Ibid.*, at paragraphs 20-22.

<sup>427</sup> C-371/92, *Greece / Ellinika Dimitriaka*, [1994] ECR I-2416.

<sup>428</sup> *Ibid.*, at paragraphs 15-25.

the Commission. However, the risks for access to justice are relatively inferior to those in upwards procedures analysed before. The mechanism of judicial cooperation exists in this kind of procedures in the form of the preliminary ruling procedure, and the competence of the judges remains at the national level. However, in some of the cases examined, the right to judicial review cannot be exercised fully.

The national courts are the natural courts for disputes arising within downwards composite procedures, but sometimes they are hand-tied to review the validity of the European acts that have in practice originated the final act. The judicial habit of focusing only on final formal administrative decisions might lead to situations where the right to judicial review is not respected<sup>429</sup>.

### Horizontal procedures

Following the classification which was laid down previously, horizontal procedures are those where co-operation takes place among national authorities of different Member States, eventually with the intervention of European bodies too. This type of composite procedures involves several national authorities, often in the context of a mutual recognition procedure but it does not remain at a purely interstate level, because the Commission might be called to intervene, particularly in case of disagreement.

These procedures are increasingly common for the approval of certain products, following the logic of mutual recognition inaugurated by the Court of Justice as a way to complete the internal market. There are several examples of these procedures in the relatively new Regulations and Directives explained in the previous Chapter. The most important example of this type of procedure is the mutual recognition decentralised procedure for the authorization of medicines for human use<sup>430</sup>. National authorities receive, process and eventually approve the applications submitted by private parties, forwarding the information to all other national

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<sup>429</sup> García de Enterría, “La ampliación de las competencias...”, at 316.

<sup>430</sup> Section 4.4.4. The rules on this special procedure are laid down in Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms (OJ 2001 L 106, 1). *See* further Della Cananea, “The European Union’s Mixed...”, at 204..

authorities. The system is based on the principle of mutual recognition, but if any Member State considers that there is a risk it might ask for the suspension of the marketing of the drug, informing the European Agency for Evaluation of Medicinal Products. In case of disagreement the Commission shall intervene, making its decision through a comitology procedure. The sequence is similar to the procedures established for the approval of genetically modified organisms<sup>431</sup>, pesticides<sup>432</sup> and biocides<sup>433</sup>.

The case-law in this type of procedures is limited, at least for the purposes of our analysis. Nevertheless, the Court of Justice has been confronted with the questions of what steps in this complex sequence can be reviewed. In the field of authorisation of GMOs, an area particularly prone to litigation, some cases reveal the approach of the EU courts to this type of procedures. The case *Greenpeace / Ministère de l'Agriculture*<sup>434</sup> shows the difficulty in determining what acts are binding on the subsequent steps and what jurisdiction is competent for each of them<sup>435</sup>.

This case concerns the authorisation of genetically modified maize by certain companies. The Commission, following the procedure established in Directive 90/220<sup>436</sup> considered the application and, receiving no objections by Members States after forwarding the dossier to them, it authorised the release of the GMO<sup>437</sup>. However, according to the rules in force at the time, whether the authorisation has been granted by the Commission or by another Member State, the Member State where the GMO release is intended must give its written consent<sup>438</sup>.

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<sup>431</sup> Section 4.4.3.

<sup>432</sup> Section 4.4.2.

<sup>433</sup> Section 4.4.5.

<sup>434</sup> C-6/99, *Greenpeace / Ministère de l'Agriculture*, [2000] ECR I-1676, more details specifically on this case in Ludwig Kramer, *Casebook on EU Environmental Law*, Hart Publishing (Oxford, 2002), at 233.

<sup>435</sup> Andreas Glaser, *Die Entwicklung des Europäischen Verwaltungsrechts aus der Perspektive der Handlungsformenlehre*, Mohr Siebeck (Tübingen, 2013), at 585.

<sup>436</sup> Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ 1990 L 117, 15-27), the authorisation had taken place by Commission Decision 97/98/EC concerning the placing on the market of genetically modified maize (*Zea mays* L.).

<sup>437</sup> C-6/99, *Greenpeace...*, at paragraphs s 6-11.

<sup>438</sup> Article 11 of Directive 90/220, and similarly Articles 15 and 16 of the French law No 92-654 of 13 July 1992 on the control of the use and release of genetically modified organisms. "The placing on the

The French authorities had given the written consent to the organism in question, but *Greenpeace* challenged such consent at the *Conseil d'État*. It found that there were serious doubts as to whether the release was lawful, both on substantial grounds, since the precautionary principle could have been breached, and procedural grounds, since one of the necessary dossier was incomplete<sup>439</sup>. The *Conseil d'État* raised the question to the Court of Justice whether or not this written consent of the French authorities to the authorisation by the Commission or by other Member States was indeed mandatory. The Court of Justice replied that if no objection was raised by the Member State at the appropriate time, then it must issue the 'consent in writing', allowing the product to be placed on the market. However, if in the meantime the Member State concerned has new information that the GMO may constitute a risk to human health and the environment, it will not be obliged to give its consent, provided that it immediately informs the Commission and the other Member States and seeks a reconsideration of the authorisation granted<sup>440</sup>.

The ruling of the Court of Justice is aligned with the previous Opinion of Advocate General Mischo. He eloquently explained that this interpretation, perhaps twisting the meaning of the word 'consent' which presupposes a willingness to give it or at least a margin of discretion to deny it, is based on the broad perspective of good faith and loyal cooperation, as

"It would, moreover, be incompatible with the duty to act in good faith which should govern the relations between the Member States and the Community and the Member States' relations with one another.

A Member State which has given a favourable opinion on a notification must be supposed to have decided to give its consent unless the joint examination of the dossier by all the Member States, which also have the benefit of information supplied by the Commission, produces justifiable

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market must be the subject of prior authorisation, which must be issued by the administrative authority after an assessment of the risks for public health or for the environment. Authorisations issued by other Member States are deemed equivalent to national authorisations for the purposes of the Law."

<sup>439</sup> C-6/99, *Greenpeace...*, at paragraphs 19 and 20.

<sup>440</sup> *Ibid.*, at paragraph 47.

reasons for refusing it. The other Member States are not going to marshal the substantial resources required to examine a dossier on placing a GMO on the market merely in order to produce an opinion for a Member State to treat as it thinks fit."<sup>441</sup>

It results from cases like this one, that the procedures in question have a peculiar legal nature which the Court of Justice does not find itself at ease assessing. Although the solution of the Court in this case is reasonable and does not create a gap in legal protection, the difficulty in allocating responsibilities for the decisions which are legally binding could be problematic in other cases.

The subsequent case law in the area of GMOs provides evidence that the allocation of responsibilities is far from clear. In the case *Monsanto / Presidenza dei Consiglio dei Ministri*<sup>442</sup> the questions were raised on what was the correct appropriate procedure for the release of certain substances, which determined, according to Regulation 258/1997 to what extent Member States authorities had the competence to refuse the release of a GMO already authorised in a different Member State<sup>443</sup>. Doubts on the responsibilities of the national authorities persisted in this area<sup>444</sup>, which results in contradictory national legislations<sup>445</sup> and the uncertainty of the competent jurisdiction.

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<sup>441</sup> *Ibid.*, at paragraphs 54 and 55.

<sup>442</sup> Case C-236/01, *Monsanto / Presidenza del Consiglio dei Ministri*, [2003] ECR I-8166.

<sup>443</sup> Here, the scope of the concept of 'substantial equivalence' was at stake, the types of genetically modified maize had already been authorised in France and the United Kingdom, and its release in Italy was put into question. C-236/01, *Monsanto...*, at paragraphs 17 and 50.

<sup>444</sup> Thus in the more recent ruling in Joined Cases C-58/10 to C-68/10, *Monsanto and others / Ministe de l'Agriculture*, [2011] I-7763. For more details on the problems of litigations concerning GMOs see Antonio Barone, "OGM e precauzione: il 'rischio' alimentare tra diritto comunitario e diritto interno, Osservazioni critiche a Corte di Giustizia Europea, sentenza 9 settembre 2003, causa C-236/2001", 4 *Foro Italiano* (2004), 245-251.

<sup>445</sup> A clear example is the recent case C-333/08, *Commission / France* [2010] ECR I-757, where French legislation was deemed contrary to Regulation 178/2002 because it created an additional prior authorisation scheme concerning substance subject to a simplified authorisation procedures, that is, substances already authorised by the other Member States. Some earlier cases also put into question the validity of some national legislations on the authorisation for GMO already authorised, like Case C-192/01, *Commission / Denmark* [2003] ECR I-9693; Case C-24/00, *Commission / France* [2004] ECR I-1277; C-270/02, *Commission / Italy* [2004] ECR I-1559; and Case C-41/02, *Commission / Netherlands* [2004] ECR I-11375.



In the area of pesticides, the Court of Justice was confronted with a similar controversy in the *Bonnarel*<sup>446</sup> case. Two wine growers had been prosecuted in France for using pesticides bought in Spain, where they had a marketing authorisation<sup>447</sup>. According to the relevant provisions of French law, that implemented the directive in force at the time<sup>448</sup>, pesticides authorised in another Member State could not be marketed in France without a prior authorisation. However, it was not clear, according to the French courts that raised the preliminary ruling procedure, whether or not this authorisation was indeed necessary for the personal or limited use of pesticides already authorised in another Member State<sup>449</sup>. The Court of Justice replied that national authorities did not have the obligation to recognise an authorisation for a pesticide granted in another Member State, but the Member State was under the obligation to apply a special simplified procedure for it<sup>450</sup>. The authorisation given by one Member State has therefore certain binding effects on other Member States, which can lead to dysfunctionalities in access to justice if the validity of the first authorisation is at stake in the jurisdiction of the other. This case illustrates that in some cases the decisions taken by a national authority can, by effect of EU law, have a certain binding character on another Member State, which calls for at least some mechanism of cooperation among courts.

Lastly, in the area of pharmaceuticals for human use, some other cases can be identified where the binding force of an authorisation given in a Member State in another Member State was put into question. An interesting case in this respect is *Synthon*<sup>451</sup>, where a company pursued an authorisation in the United Kingdom for a product approved by the Danish authorities<sup>452</sup>. The authorisation was rejected by the British authorities on the ground that the requirement of 'essential similarity' had not been met. The Court of Justice argued that the procedure of mutual recognition did

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<sup>446</sup> Joined Cases C-260/06 and C-261/06, *Bonnarel and Escalier* [2007] ECR I-09717.

<sup>447</sup> *Ibid.*, at paragraph 16.

<sup>448</sup> Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230).

<sup>449</sup> C-260/06 and C-261/06, *Bonnarel and Escalier* ..., at paragraph 20.

<sup>450</sup> *Ibid.*, at paragraph 43.

<sup>451</sup> C-452/06, *Synthon* [2008] ECR I-7681.

<sup>452</sup> *Ibid.* at paragraphs 13-20.

not allow for a second assessment on the substantial elements of the product, unless the specific conditions for non-recognition -such as risk to public health - were present<sup>453</sup>. Furthermore, the lack of recognition was, according to the Court of Justice, capable of rendering that Member State liable in damages<sup>454</sup>, but the determination of this liability corresponded to the national courts<sup>455</sup>. This case, as some commentators pointed out, revealed the complexities of allocating public liability for damages<sup>456</sup>.

More recently, in the case *Lyocentre / Lääkealan turvallisuus*<sup>457</sup>, the Court of Justice was asked whether or not the classification of a product in one Member State as a medical device precluded the competent authorities of another Member State from classifying the same product as a medicinal product. The Court of Justice concluded that the second Member State can approve the product as a medicinal product<sup>458</sup>, but the previous classification as a medical device does have an impact on the procedural arrangements that must be followed<sup>459</sup>.

Although in this horizontal schemes the shortcomings regarding access to justice for the individual are more difficult to see, it is certainly worth noting that, under EU law, an administrative decision by one national authority can potentially have effects on and administrative procedure operating in another Member State. The Court of Justice establishes in its rulings a clear distinction of powers between the national and European levels of decision-making. In horizontal procedures, the Court has often been called to rule on the binding character of the acts issued by national authorities in other procedures taken place at another Member State. Although the national courts are the jurisdiction to rule on the lawfulness of such measures, the Court of Justice must interpret the applicable EU laws to determine to what extent responsibility corresponds to one or another Member State. In cases such as the ones

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<sup>453</sup> *Ibid.* at paragraph 33.

<sup>454</sup> *Ibid.* at paragraph 46.

<sup>455</sup> *Ibid.* at paragraph 36.

<sup>456</sup> See Pekka Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond*, Hart Publishing (Oxford, 2011), at 99.

<sup>457</sup> C-109/12, *Laboratoires Lyocentre / Lääkealan turvallisuus* [2013] (ECLI:EU:C:2013:626).

<sup>458</sup> *Ibid.* at paragraph 48.

<sup>459</sup> *Ibid.* at paragraph 48.

referred, if the validity of an approval issued in a country was put to question in another country to which the first was obligatory -in accordance with the case law of the Court of Justice - , a gap in access to justice would again appear. Additional mechanisms of cooperation between Courts would be necessary in these cases.

*(B) Second gap: what acts can be reviewed?*

The very essence of composite procedures lies on the contributions made by different parties and so the legal concern arises not only relating to the determination of the competent court, but also on whether or not this input constitute measures of such nature that they can be actionable.

The subject matter of reviewable acts is very complex. Part of the complexity is explained by the fact that the relevant analysis lies not only on the position taken by the European courts, but also from structure the national systems of judicial review of administrative acts and how broadly they envisage the right of individuals to challenge administrative acts<sup>460</sup>. In the absence of a normative framework equivalent to the national administrative procedural act, the Court of Justice was forced to have a certain understanding of the basic concepts of administrative law, such as the 'administrative decision' or 'administrative act', and then lay down the conditions for its reviewability in accordance with the Treaties<sup>461</sup>. There was a concept of 'decision' in primary law since the very beginning (Article 14 of the repealed TECSC), that through several modifications is still laid down in Article 288 TFEU<sup>462</sup>. This concept does not coincide with the notion of reviewable act<sup>463</sup>. This is so because the relevant

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<sup>460</sup> The terminology of administrative act is not necessarily shared by the academia of the different European countries, even referring to EU law. It is a terminology used in some countries, such as Germany, Italy and Spain, and considered superfluous in others, notably in the United Kingdom. See further Xabier Arzoz Santisteban, "Acto y Procedimiento Administrativo: un Catálogo de Problemas", in José Eugenio Soriano García (dir.), *El Procedimiento Administrativo Europeo*, Civitas (Madrid, 2023), 195-250, at 206. Whether we refer to administrative acts or decision, such terminology is relevant in our context as it allows a better understanding of the measures that can be subject to judicial review.

<sup>461</sup> See for the concept and conditions of the reviewable act Lenaerts, Maselis, and Gutman, *EU Procedural Law*..., at 257 ff.

<sup>462</sup> "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

<sup>463</sup> Hoffman, Rowe, and Türk, *Administrative Law and Policy*..., at 626. In particular, not all decisions in the meaning of Article 288(4) TFEU are being capable of being challenged before the EU courts.

factor for qualifying a measure as a decision subject to judicial review is its substance, not its form, as it has long been argued by the Court of Justice<sup>464</sup>.

The basic idea that found in the early case-law of the Court of Justice in interpretation of the provisions of the action for annulment is that the acts in question “whatever their nature of form, [shall] be intended to have legal effects”<sup>465</sup>. The first case with such reasoning was *ERTA*<sup>466</sup>. The existence of these 'legal effects' can be translated into the 'binding character' of the measure in question<sup>467</sup>. This is why the Court of Justice rejected from its earliest cases the possibility to review opinions and recommendations<sup>468</sup>, among other measures<sup>469</sup>.

As previously argued, the gist of the rule of law is that acts can be subject to review by an impartial court. However, there are two basic conceptions of administrative justice among the national systems in the EU. Under the subjective conception, the scope of judicial control should be as wide as to permit the reviewability of all acts, whether or not they are final, provide they affect individual rights. Since the ruling in *ERTA*, the case-law of the Court of Justice has focused on the substance of the act rather than its form, consequently, the scope of reviewable

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Likewise, measure that did not take the form of a decision under the Treaties can still be subject to judicial review under some conditions.

<sup>464</sup> Anthony Arnall, "The Action for Annulment: A Case of Double-Standards?" David O'Keeffe and Antonio Bavasso (eds.), *Judicial Review in European Union Law, Volume 1*, Kluwer Law (The Hague, 2000), 177-90, at 179.

<sup>465</sup> Trevor C. Hartley, *The Foundations of European Union Law*, Oxford University Press (Oxford, 2007), in particular, chapter 11 on 'Reviewable Acts', 325-341.

<sup>466</sup> Case 22/70, *Commission / Council* [1972] ECR 263, paragraph 42. For a more detailed overview of the early case law on the reviewability of acts see Jürgen Schwarze, *Europäisches Verwaltungsrecht, Nomos* (Baden-Baden, 2006), at 929 ff. The doctrine that the legal effect stem from the content of the act and not from its form has been reiterated in many judgements, such as, Case 60/81 *IBM / Commission* [1981] ECR 2639, at paragraph 9; Case C-443/97 *Spain / Commission* [2000] ECR I-2415, at paragraph 27; Case C-131/03 P *Reynolds Tobacco and Others / Commission* [2006] ECR I-7795, at paragraph 54; and Case C-521/06 P *Athinaiki Techniki / Commission* [2008] ECR I-5829, at paragraph 29.

<sup>467</sup> Lenaerts, Maselis, and Gutman, *EU Procedural Law*..., at 260.

<sup>468</sup> Joined Cases 1/57 and 2/57 *Société des Usines à Tubes de la Sarre / High Authority* [1958] ECR 105, at 112.

<sup>469</sup> There are many example of measures that have not been considered reviewable due to the lack of binding character, like an OLAF report (Case T-309/03, *Camos Grau / Commission* [2006] ECR II-1173), a decision by the European Ombudsman (T-196/08 *Srinivasan / European Ombudsman*, not reported, at paragraph 13), or a decision not to take further action in the context of a complaint (T-341/10 - F91 *Diddelég and Others / Commission* [2012] (ECLI:EU:T:2012:183)).

acts is broader than laid down in the Treaties<sup>470</sup>. Like in the previous section, one can perceive how the lack of a general understanding of composite procedures and, more generally, the lack of consideration for the procedural context of each decision subject to review, is severely detrimental to the individual right of access to justice.

These initial considerations are particularly relevant in the context of composite procedures. The Court of Justice only considers reviewable final decisions in the sense that they are apt for bringing about a distinct change to the legal position of the party<sup>471</sup>. There can be binding decisions along the administrative procedure, but if they lead to a subsequent phase where another authority is called to take a decision, the interim measure will generally not be subject to review<sup>472</sup>. Thus, as regards composite procedures in particular, the categories of acts which have raised doubts as to whether they could be challenged are the following:

#### Preparatory acts

Preparatory acts are those intermediate decisions or interlocutory measures taken throughout the administrative procedure, which contribute to the development of the decision-making, paving the way to, but not constituting, the final decision. Its main characteristic is that they do not have external legal effects, thus they do not by itself touch upon the legal position of the concerned party, and they are thus not reviewable<sup>473</sup>. This lack of legal effects does not mean that the preparatory act is deprived of a binding character, but the obligation that they entail, if any, remains at a purely internal level.

Preparatory acts are particularly relevant in composite procedures because they involve a sequence of steps by different administrations, so each step is in itself a preparatory act. In the context of composite procedures, preparatory acts can appear at

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<sup>470</sup> Hofmann, *Administrative Law and Policy*..., at 802.

<sup>471</sup> Hoffman, Rowe, and Türk, *Administrative Law and Policy*..., at 626

<sup>472</sup> *Ibid.*

<sup>473</sup> Emilie Chevalier, "Le mécanismes de la procédure administrative non contentieuse de l'Union", in Jean-Bernard Auby, Jacqueline Dutheil de la Rochère, *Traité de droit administratif européen*, Bruylant (Brussels, 2014), 201-13, at 204; Lenaerts, Maselis, and Gutman, *EU Procedural Law*..., at 279; and Scharze, "Judicial Review of European...", at 89.

an administrative level different from that at which the administrative decision is taken, and they sometimes bind a different administrative authority. Following the line of reasoning held in the previous sections, in order to provide sufficient access to justice at least some of these acts have to be susceptible of judicial review *per se*. In other cases however, they shall be reviewed as part of the final decision, in which they can be subsumed. Again, this issue is particularly delicate in composite procedures as the preliminary steps may be originated at an administrative level different from that the issues the final decision, which eventually may determine the competent jurisdiction too.

However, it appears from the academic literature in the context of 'preparatory acts' in EU law that the non-reviewability by courts is an essential feature thereof<sup>474</sup>. That is also the view of the Court of Justice, as it systematically calls preparatory acts those over which it accepts no jurisdiction on the assumption that an "act is open to review only if it is a measure definitively laying down the position of the Commission at the conclusion of that procedure"<sup>475</sup>.

There are alternative stances on the possibility to challenge preparatory acts, even if outside the context of composite procedures. For example, according to professor Hartley<sup>476</sup>, the exact requirements of the law for such preparatory acts is key for determining whether or not they can be reviewed or not. If the preparatory act is binding and may, in one way or another, determine the outcome of the procedure, so the final decision cannot be made regardless of the previous act, then it shall be possible to challenge it. If, on the other hand, the preliminary act has to be taken into account but only that, it does not affect anyone's legal position and it is not a reviewable act.

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<sup>474</sup> Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law: Text and Materials*, Cambridge University Press (Cambridge, 2014), at 426, and bibliography cited in footnote 473.

<sup>475</sup> Case C-39/93 P *SFEI and Others / Commission* [1994] ECR I-2681, paragraphs 27 and 28; T-59/00, *Compagnia Portuale Pietro Chiesa / Commission* [2001] ECR II-01019, at paragraph 42; Case T-95/99 *Satellimages TV5 v Commission* [2002] ECR II-1425, paragraph 32; and T-260/04 - *Cestas / Commission* [2008] ECR II-701, at paragraph 69.

<sup>476</sup> Hartley, *The Foundations of European Union...*, at 332.

By contrast, the Court of Justice has taken a much narrower view. The starting case of the judicial concept of preliminary acts is *Huber / Commission*<sup>477</sup>. This civil service case concerns the reviewability of a report by a consultative body. If this report was unfavourable, as was the case, the decision-making authority could not take the final decision to establish an official. The Court of Justice held in that case that:

“Although ... the opinion of the Establishment Board constitutes an essential factor in the decision if it is unfavourable to the integration of the servant, it is not, however, for the purposes of an appeal ..., a measure separable from the decision of that authority. It therefore cannot be considered as having a direct adverse effect upon the applicant.”<sup>478</sup>

It is significant that in this case Advocate-General Roemer considered that the report was reviewable, as the final decision was bound by this unfavourable report<sup>479</sup>. The reasoning of the Court of Justice leads to a legal dead end; the preliminary act is not reviewable as it is not separable from the final decision, but the final decision takes for granted the considerations of the preliminary act, so the judicial review on those grounds is not always complete. This latter consideration is all the more true in composite procedures, where one court will plainly reject jurisdiction to rule on the validity of what other administration has decided. The initial ruling in *Huber* was reiterated by the Court of Justice in other civil service cases before the Court of Justice<sup>480</sup>, then the CFI<sup>481</sup> and finally the Civil Service Tribunal<sup>482</sup>.

This narrow interpretation of the reviewability of preparatory acts appears in other areas too. Competition law, where procedures are at times long sequences of

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<sup>477</sup> Case 78/63, *Huber / Commission*, [1964] ECR 367.

<sup>478</sup> *Ibid.* at pages 375-6.

<sup>479</sup> Case 78/63, *Huber / Commission*, opinion delivered on 12 June 1964 [1964] ECR 382.

<sup>480</sup> Case 11/64, *Weighardt / Commission*, [1965] ECR 285; and Case 346/87, *Bossi / Commission*, [1989] ECR 285.

<sup>481</sup> Joined Cases T-32/89 and T-39/89, *Marcopoulos / Court of Justice*, [1990] ECR II-281; Case T-130/89, *B / Commission* [1990] ECR II-761; Case T-324/02 *McAuley / Council* [2003] ECR II-1657; and Case T-311/04, *Buendía Sierra / Commission* [2006] ECR II-4148.

<sup>482</sup> Case F-94/08, *Marcuccio / Commission*, Order of 29 October 2009 (not published).



acts each entailing possible violations of individual rights, is one of the areas where this issue was more contested and where we can find more details on the position of the Court of Justice was more detailed.

The sample case is *IBM*<sup>483</sup>. The Commission had been investigating IBM on the possible abuse of its dominant position. Throughout the long procedure, the Commission sent a letter with the statement of objections saying that it intended to make a decision regarding several infringements. IBM considered that administrative procedure was defective in a number of respects and it challenged the letter. The Court of Justice makes important considerations and argues that:

“In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.

It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case.

Furthermore, it must be noted that whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step.”<sup>484</sup>

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<sup>483</sup> Case 60/81, *IBM / Commission*, [1981] ECR 2640.

<sup>484</sup> *Ibid.*, at paragraphs 10-12.

Several elements are relevant within this ruling<sup>485</sup>. The Court of Justice takes the viewpoint that, as a general rule, only final decisions can be challenged. There are exceptions to this rule, but only if this preparatory act is a culmination of a special procedure. Furthermore, this line of reasoning does not imply that preparatory acts cannot be reviewed. They can be reviewed as part of the whole procedure when the final act is challenged<sup>486</sup>. However, this latter assumption does not necessarily apply to composite procedures as there are several intervening administrative authorities. Despite that element, the EU courts would not change the original stance of *IBM*. Moreover, the Court of Justice had consistently held, that it was not the announcement of the intention to adopt a decision but the actual adoption of the decision which was capable of having legal effects<sup>487</sup>.

The strict stance of the Court of Justice on the reviewability of preparatory act was confirmed by an extensive case law in the same field of competition law. Thus, not only the statement of objections<sup>488</sup> was deemed an unreviewable preparatory act but also a letter with preliminary observations to withdraw the benefit of the block exemption<sup>489</sup>; a decision finding that a joint venture forms part of wider cooperation<sup>490</sup>; a preliminary letter assessing an operation between undertakings<sup>491</sup>; a decision rejecting the applicant's request not to communicate to third parties certain information<sup>492</sup>; a decision not to pursue the procedure relating to the complaint of price-fixing<sup>493</sup>; a decision to bring procedures before a national court<sup>494</sup>; the initiation

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<sup>485</sup> See in more detail, Alexander Türk, *Judicial Review in EU Law*, Edward Elgar Publishing (Cheltenham, 2009), at 17.

<sup>486</sup> This element is stressed and analysed by Mario Chiti, *Diritto Administrativo Europeo*, Giuffrè Editore (Milan, 2011), at 564-565.

<sup>487</sup> Case 114/86, *United Kingdom / Commission* [1988] ECR 5289, at paragraph 13; Case C-180/96 *United Kingdom / Commission* [1998] ECR I-2265, at paragraph 28; Case 443/97, *Spain / Commission* [2000] ECR I-2415, at paragraph 34; and Case T-265/08, *Germany / Commission* [2012], not published in the ECR. Lenaerts, Maselis, and Gutman, *EU Procedural law...*, at 272.

<sup>488</sup> Case T-138/89, *NBV / Commission* [1992] ECR II-2183, at paragraph 31.

<sup>489</sup> Case T-64/89, *Automec / Commission* [1990] ECR II-369, at paragraph 46.

<sup>490</sup> Case T-87/96, *Assicurazione Generali / Commission*, [1999] ECR II-206, paragraph 37.

<sup>491</sup> Case T-3/93 *Air France / Commission* [1994] ECR II-121, at paragraphs 45 to 47, Joined Cases T-125/97 and 127/97 *Coca-Cola / Commission* [2000] ECR II-1737, at paragraph 77.

<sup>492</sup> Case T-90/96, *Peugeot / Commission* [1997] ECR II-665, at paragraph 32.

<sup>493</sup> Case T-411/05, *Annemans / Commission* [2007] ECR II-87, at paragraph 32.

<sup>494</sup> Case C-131/03 P, *Reynolds Tobacco / Commission* [2006] ERC I-7823, at paragraph 54..

of a proposed undertaking in an antidumping proceeding<sup>495</sup>; or the rejection thereof<sup>496</sup>, among many others.

In the field of state aid, where procedures bring about multiple exchange of information, the approach of the EU courts has been similar<sup>497</sup>. Given the complexities of State aid procedures, the Court of Justice has taken a somewhat more liberal approach, giving access to justice in the context of the challenging to certain acts which it refuses to call preparatory<sup>498</sup>. For example, the opening of a certain procedure can be challenged inasmuch as it has the binding effect of blocking further granting of aid<sup>499</sup>. More interestingly, in *Athinaiki Techniki*<sup>500</sup> the Court of Justice quashed the previous ruling of the CFI. The approach of the Court of Justice, contrary to what had been decided by the CFI, is that the preliminary decision of the Commission, which prevented the interested party of submitting any further observations, was a reviewable act. The contested act cannot be classified as preparatory since it cannot be followed, in the context of the administrative procedure which has been initiated, by any other decision amenable to annulment proceedings<sup>501</sup>. The key element for the Court of Justice is thus whether or not the

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<sup>495</sup> Joined Cases C-133/87 and C-150/87, *Nashua Corporation / Commission* [1990] ECR I-719, at paragraph 9; Case T-134/95, *Dysan Magnetics / Commission* [1996] ECR II-181, at paragraph 23; and Case T-75/96, *Söktas / Commission* [1996] ECR II-1691, at paragraph 15. The two last cases concern the initiation of anti-dumping proceedings.

<sup>496</sup> Case C-156/87, *Gestetner Holdings / Council and Commission* [1990] ECR I-781, at paragraph 8; C-179/87, *Sharp Corporation / Council* [1992] I-1635, at paragraph 9; and Case C-177/87, *Sanyo Electric / Council* [1992] ECR I-1535, at paragraph 9.

<sup>497</sup> Case T-87/09, *Andersen / Commission*, [2009] ECR II-225\*, at paragraph 50, and, more recently, T-317/09, *Concord Power Nordal / Commission* [2010] ECR II-00253\* and C-322/09 P, *NDSHT / Commission* [2010] ECR I-11911, at paragraph 45. On the large case law in the state aid sector denying access to the court in cases of mere individual transmission of information see Herwig C.H. Hofmann and Alessandro Morini, "Judicial Review on Commission Decisions in State Aid", in Erika Szyszczak (ed.), *Research Handbook on European State Aid Law*, Edward Elgar Publishing (Cheltenham, 2011), 354-89, at 360.

<sup>498</sup> Leigh Hancher, Tom Ottervanger, and Piet Jan Slot, *EU State Aids*, Sweet & Maxwell, (London, 2012), at 1029.

<sup>499</sup> Case C-47/91, *Italy / Commission* [1992] ECR I-4145, paragraphs 25 to 30; Case C-312/90, *Spain / Commission* [1992] ECR I-4117, paragraphs 17 to 24; and Case C-400/99, *Italy / Commission* [2001] ECR I-7303, paragraphs 57 to 65.

<sup>500</sup> Case 521/06 P, *Athinaiki Techniki / Commission*, [2008] ECT I-5829, at paragraph 55. For a further analysis of the relevance of this ruling see Hanns Peter Nehl, "Judicial Protection of Complainants in EC State Aid Law: A Silent Revolution? ECJ, judgment of 17 July 2008 in Case C-521/06 P *Athinaiki Techniki v Commission*" 3 *European State Aid Law Quarterly* (2009), 401-12.

<sup>501</sup> Case 521/06 P, *Athinaiki Techniki*... at paragraph 54.

preparatory act can be challenged indirectly, together with the final decision of the administrative procedure in question. If it is not the case, then there is no way to respect the right of judicial review other than to grant access to such review even if the measure is not final, considering the procedural rules applicable to it.

This reasoning is essential in the solutions that we are advocating for in this work. As a commentator argued citing this ruling, "the demands arising from the EU's rule of law principle, including the requirement of effective judicial protection, can be honoured by the system supplying the shortcomings of individual avenues of redress offering access to others"<sup>502</sup>. In other words, the Court of Justice is obliged to go beyond the procedural conditions that might be laid down in the law in a particular case in order not to incur in a breach of the right of judicial review.

Another interesting example in the field of competition law of a case where the preparatory decision was deemed challengeable by the Court of Justice is *AZKO*<sup>503</sup>. In this case, the Commission started an investigation procedure due to a complaint by a competitor of AZKO. The Commission took the decision to show some documents belonging to AZKO to the complainant<sup>504</sup>. Even though the final decision only was open to judicial review, according to the rules at the time, the Court of Justice understood that such review would be unable to undo the damage done to AZKO<sup>505</sup>, and therefore proceeded to review the substance of the preparatory decision. In this case, the key element that explains the admissibility of the action is that the measure, even if not final, had independent legal effects that affected the applicant irrespective of the legality of the final decision<sup>506</sup>.

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<sup>502</sup> Marton Varju, *European Union Human Rights Law: The Dynamics of Interpretation and Context*, Edward Elgar Publishing (Cheltenham, 2014), at 127.

<sup>503</sup> C-53/85, *AKZO Chemie / Commission* [1986] ECR 1965.

<sup>504</sup> *Ibid.* at paragraph 11.

<sup>505</sup> *Ibid.* at paragraph 20.

<sup>506</sup> Türk, *Judicial Review in EU Law...*, at 21 and Albertina Albors-Llorens, *EC Competition Law Policy*, Routledge (New York, 2014) at 125.

There are some other examples along the same lines. In *Cenemesa*<sup>507</sup>, the Commission's decision to initiate a investigative phase of the procedure for examining the legality of a State aid with the common market was challenged. Since such decision entails the automatic obligation to suspend payment of the aid, it is not simply a preparatory step, and has irreversible consequences regardless of the final decision<sup>508</sup>. Hence, the Court of Justice considered it an actionable decision<sup>509</sup>. Thus, the position of the Court of Justice is that a preparatory act in appearance, can be deemed reviewable, thus not preparatory strictly speaking, as long as it has independent legal effects and such effects cannot be reviewed when challenging the final decision.

An illuminating case for the distinction of the different categories of preparatory acts is *UK / Commission*<sup>510</sup>. The case concerned structural funds (ERDF and ESF) awarded to an operation programme related to three British cities. According to the Commission, the UK authorities had failed to meet a formality (the communication of the final certificate of expenditure) and sent a letter by which it communicated that it intended to decommit a large part of the funds<sup>511</sup>. Advocate General Stix-Hackl distinguished in her opinion between the internal and external legal effects of each step of the sequence<sup>512</sup>. Since the Commission had argued that decommitment itself is an internal process and, as such, not actionable, the AG, and subsequently the Court of Justice, reasoned in detail that the decision had autonomous external legal effects because it was binding and implied by itself that a certain amount that had been committed would not be paid<sup>513</sup>.

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<sup>507</sup> C-312/90, *Spain / Commission* [1992] ECR I-4117.

<sup>508</sup> *Ibid.* at paragraph 22.

<sup>509</sup> The reasoning was equally applied to other state aid cases such as Case C-47/91, *Italy / Commission* [1992] ECR I-4145, at paragraph 25; and Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, *Cimenteries CBR and Others v Commission* [1992] ECR II-2667, at paragraph 46.

<sup>510</sup> Case C-46/03, *United Kingdom / Commission*, [2005] ECR I-10199. However, it must be underlined that the case relates to the litigation of public bodies only, so the conclusions of this ruling are only *mutatis mutandis* applicable to the actions brought by individuals.

<sup>511</sup> *Ibid.* at paragraphs 4-16.

<sup>512</sup> Case C-46/03, *United Kingdom / Commission*, [2005] ECR I-10169, paragraphs 43-47.

<sup>513</sup> *Ibid.*, paragraph 47.

In the case of comitology, the proposal forwarded by the Commission to the comitology committees has consistently been considered a non-reviewable act<sup>514</sup>. More important would be the possibility to challenge the opinion issued by comitology committees, as they entail the contribution at least in some form of the national level to the final decision to be made at the European level.

In the case of procedures involving different bodies and committees in agencies, the position of the CFI has been similar. The sample case is *Olivieri*<sup>515</sup>. The case concerns the application for authorisation of a new medicinal product with the substance deferiprone to counter iron overload caused by the treatment of Cooley's syndrome<sup>516</sup>. The medicine had been first researched by Dr Olivieri in the United States, where the clinical trials showed limited efficacy and serious side effects. Apotex, a Canadian company financing the trials terminated Dr Olivieri's involvement<sup>517</sup>, and its subsidiary in Europe submitted an application to the EMA for the granting of a marketing authorisation subject of the centralised authorisation procedure provided for in Regulation No 2309/93. The Committee for Proprietary Medicinal Products delivered an opinion in favour of granting marketing authorisation for the medicinal product, which was transmitted by the EMA to the Commission. The Commission proceeded to issue a favourable draft decision which was endorsed by the Standing Committee on Medicinal Products for Human Use<sup>518</sup>.

When Dr. Olivieri became aware of the fact that the CPMP had issued a favourable opinion, she sent a number of letters to the EMA and to the members of the CPMP giving them her observations and evidence on the low efficacy and risks

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<sup>514</sup> Case T-55/01 R, *Ashahi Vet / Commission* [2001] ECR II-1935, at paragraph 68; Case T-454/05 R, *Sunitomo Chemical / Commission* [2007] ECR II-31\*, at paragraph 50; Case C-150/06 P, *Arizona Chemical / Commission*, [2007] ECR I-39\*, at paragraph 23; and Case T-393/06, *Makhteshim-Agan / Commission*, [2008] ECR II-293\*, at paragraph 32. This case law is of limited relevance for the purposes of our study, as the preliminary act originates in the same level of decision-making as the final act. This does not mean that the Commission is always the Institution that takes the final decision, the Council could in some cases be in such position. In either case, the decision is issued at the 'European' level.

<sup>515</sup> Case T-326/99, *Olivieri / Commission*, [2003] ECR II-6057. See further Madalina Busuioc, *European Agencies: Law and Practices of Accountability*, Oxford University Press (Oxford, 2013), at 214.

<sup>516</sup> *Ibid.*, at paragraph 12.

<sup>517</sup> *Ibid.*, at paragraph 20.

<sup>518</sup> *Ibid.*, at paragraphs 27 and 28.

linked with that product<sup>519</sup>. The Commission informed the CPMP that the marketing authorisation procedure had been suspended pending additional scientific clarification of the information, and convened an ad-hoc expert working group<sup>520</sup>. In view of the recommendations of the Expert Group, the CPMP decided to retain the initial opinion in favour of granting marketing authorisation but it recommended a revision of the package leaflet in order to extend the information. The CPMP consequently adopted a revised opinion which was incorporated by the Commission into a new draft decision. After the favourable opinion of the Standing Committee, the Commission adopted the decision granting marketing authorisation<sup>521</sup>. Dr Olivieri challenged the revised opinion of the CPMP on several grounds. Although it resulted from the circumstances of the case that such revised opinion, based on the conclusion of the expert group, had been essential in determining the outcome of the procedure, the CFI dismissed the action as inadmissible. In so doing, the CFI stated that:

“The revised opinion [of the committee] is therefore an intermediate measure whose purpose is to prepare for the marketing authorisation decision. It is a preparatory measure which does not definitively lay down the Commission's position and is therefore not a challengeable act ...”<sup>522</sup>

The same position was adopted in other cases relating to the procedures for authorisation of pharmaceuticals. For example, in *Pfizer*<sup>523</sup>, the Court of Justice rejected that the referral made by the Commission to the European Agency for the Evaluation of Medicinal Products could be challenged<sup>524</sup>. The referral did not have, in the view of the Court of Justice, independent legal effects.

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<sup>519</sup> *Ibid.*, at paragraph 27.

<sup>520</sup> *Ibid.*, at paragraph 28 and 31.

<sup>521</sup> *Ibid.*, at paragraph 34.

<sup>522</sup> *Ibid.*, at paragraph 53.

<sup>523</sup> Case T-123/03, *Pfizer / Commission* [2004] ECR II-1633.

<sup>524</sup> *Ibid.*, at paragraphs 21-25.



Another interesting case in the field of authorisation of pharmaceuticals is *Sepracor*<sup>525</sup>. A pharmaceutical company filed an application with the EMA for the approval of a medicinal product used in the treatment of insomnia. Although the committee within the EMA recommended giving marketing authorisation to the product, it considered that the active substance that it contained was not new, an aspect that precluded that company from benefiting from a period of market exclusivity. Since the Commission informally indicated that it would follow the recommendation of the EMA, the applicant decided to withdraw its application and challenge the letter of the Commission with its intentions<sup>526</sup>. In particular, the applicant claimed that if it had waited until the final position of the Commission was formally adopted, it would be at risk of losing much of its competitive position *vis-à-vis* its competitors<sup>527</sup>. The General Court argued that the letter did not alter the applicant's legal position<sup>528</sup> and dismissed the action as inadmissible. The Court of Justice dismissed the appeal<sup>529</sup>, by arguing that:

"the case-law shows that an intermediate measure is not capable of forming the subject-matter of an action if it is established that the illegality attaching to that measure can be relied on in support of an action against the final decision for which it represents a preparatory step. In such circumstances, the action brought against the decision terminating the procedure will provide sufficient judicial protection."<sup>530</sup>

Coming back to the logic of composite procedures, the essential element to determine the reviewability of the act, even as a step of a national administrative sequence, is thus if it produces binding effects. The second condition, *i.e.* that these legal effects cannot be subject to review in an eventual action against the final decision, appear automatically in composite procedures as the EU judges will not

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<sup>525</sup> T-275/09, *Sepracor Pharmaceuticals / Commission* [2011] ECR, II-00213\*. See for a detailed analysis André den Exter and Maria Eva Földes, *Casebook on European Union Health Law*, Maklu (Antwerp, 2014), at 466 ff.

<sup>526</sup> *Ibid.*, at paragraphs 1-7.

<sup>527</sup> *Ibid.*, at paragraph 24.

<sup>528</sup> *Ibid.*, at paragraph 27.

<sup>529</sup> C-477/11 P, *Sepracor Pharmaceuticals / Commission* [2012] (ECLI:EU:C:2012:292).

<sup>530</sup> *Ibid.*, at paragraph 57.

have jurisdiction to rule on the validity of the measure adopted by the national authorities.

The situation concerning the specific problem of composite procedures is not satisfactory. Although the case-law is still limited, the problem of considering that a preparatory act is not reviewable is that, coming from a different level of decision-making, the competent court for the final act will not be able to properly assess the validity of the previous act. In such cases the national jurisdiction would be the natural *forum* for the reviewability of the preparatory acts, but there is no mechanism to ensure any coordination.

As a result, unless one court has procedural means to ask the other for the validity of the contributions, there can be a vacuum in judicial protection of individuals. Furthermore, the strict stance on the possibility of challenging preparatory acts is not entirely consistent with some of the considerations made in the *Borelli* case-law, as it puts national courts in charge of ruling on acts that could be unreviewable preparatory acts according to the Court of Justice's own interpretation.

### Confirmatory acts

Confirmatory acts can be defined as those that merely reproduce a previous decision, without adding any new element or additional legal effect. The administrative decision which they confirm is in itself the actionable decision. Since an early time, the Court of Justice always declared confirmatory acts as inadmissible<sup>531</sup>. In many cases, the EU courts have underlined that the admissibility of actions against confirmatory acts would make possible to circumvent the deadline for

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<sup>531</sup> Joined Cases 42/59 and 49/59, *SNUPAT / High Authority* [1961] ECR 53, at page 75; Case 56/72, *Goeth / Commission* [1973] ECR 181, at paragraph 15; Case 1/76 *Wack / Commission* [1976] ECR 1017, at paragraph 7; Joined Cases 166/86 and 220/86 *Irish Cement / Commission* [1988] ECR 1875, at paragraphs 1-16; Case C-199/91, *Foyer Culturel du Sart Tilman / Commission* [1993] ECR I-4265, at paragraph 24; Case C-480/93 P *Zunis Holding / Commission* [1996] ECR I-1, at paragraph 14; Case C-12/90 *Infortec / Commission* [1990] ECR I-4265, at paragraph 10 ; and Case T-331/94 *IPK / Commission* [1997] ECR II-1665, paragraph 24. See further Lenaerts, Maselis, and Gutman, *EU Procedural Law...*, at 270 and Türk, *Judicial Review in EU Law...*, at 27.

bringing an actions against the original act<sup>532</sup>, though in some cases the EU Courts have nuanced their position<sup>533</sup>.

More interestingly for the purposes of composite procedures, a situation where an authority in the EU merely takes notice of a decision taken at the national level but which produces effects at the level of the Union is also confirmatory and therefore not actionable<sup>534</sup>. For instance in *Le Pen / Parliament*<sup>535</sup>, the European Parliament's acknowledgement of the French government's declaration that one of the Members was barred from holding office as MEP was considered not actionable<sup>536</sup>. Even though this case did not concern a composite administrative procedure, an analogous reasoning in the context of one<sup>537</sup> would raise similar concerns as in the previous sections, that is, the EU courts would not have jurisdiction to rule on the validity of the original act, but would not be able to review the substance of the case, as the confirmatory act would not be actionable. One could argue that the means of redress would have to be expected at a national jurisdiction, but since the confirmation would imply legal effects at the level of the Union, it is possible that the review at the national level was not complete.

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<sup>532</sup> Joined Cases 166/86 and 220/86 *Irish Cement / Commission* [1988] ECR 6473, at paragraph 16; Case T-275/94 *CB / Commission* [1995] ECR II-2169, at paragraph 27; Case T-227/95 *AssiDomän Kraft Products and Others v Commission* [1997] ECR II-1185, paragraph 29; and T-456/07, *Commission / CdT* [2010] ECR II-183, at paragraph 54.

<sup>533</sup> For example, when there is a new fact of such character as to alter the essential circumstances that surrounded the adoption of the original decision, even though the new act has the same content as the original, an action against the new act would be admissible: Joined Cases 193/87 and 194/87, *Maurissen and European Public Service Union / Court of Auditors* [1989] ECR 1045, at paragraph 26; and Case T-442/11 *Europaiki Dynamiki / Commission* [2012], not published in the ECR, at paragraph 66. Lenaerts, Maselis, and Gutman, *EU Procedural Law...*, at 271. Even with no new factors, the new decision can be actionable if there was a reconsideration of the position of the Institution, for instance, Case T-331/94 *IPK München / Commission* [1997], ECR II-1665, at paragraph 26.

<sup>534</sup> Türk, *Judicial Review in EU Law...*, at 28.

<sup>535</sup> Case T-353/00 *Le Pen / Parliament* [2003] ECR II-1729.

<sup>536</sup> *Ibid.*, at paragraph 97. On appeal, the Court of Justice confirmed the inadmissibility declared by the CFI (Case C-208/03 P, *Le Pen / Parliament* [2005], ECR I-6051), but it underlined, as it had been one of the arguments raised by the applicant, that the act of Parliament was not strictly speaking a confirmatory act (Case C-208/03 P, *Le Pen / Parliament*, at paragraph 57 and, more in detail, Opinion of the AG Jacobs on Case C-208/03 P, *Le Pen / Parliament* [2005], ECR I-6054, at paragraph 63).

<sup>537</sup> The structure of the *Borelli* case explained at length in the previous sections would be a clear example of such a situation. The national authorities are entitled to forward a negative report to the Commission, which would be bound to reject the application for funds, thus 'confirming' the previous act.

In both confirmatory and preparatory acts the assumption of the EU courts is that they are not reviewable because judicial review is pertinent only on the final decision (or the prior decision that is subsequently confirmed). That assumption might work if there is a common understanding of what is a preparatory act and a confirmatory act and in what cases they can be brought to the courts for judicial review. In composite procedures, the assumption is necessarily wrong when the preparatory, or confirmatory, act and the main, actionable act stem from different administrative authorities. There is no system of coordination, and a lack of common understanding of the reviewability of administrative acts in the different European administrative jurisdictions.

### Transfer of information

Composite procedures often entail a diverse exchange of information. Such exchange of information faces even greater shortcoming in view of its reviewability than preparatory acts, because it tends to be more informal and the act to be challenged is often more difficult to identify.

Additionally, the distinction between a preparatory act and a transfer of information is not clear when examining the case-law of the Court of Justice. In general, transfer of information can be understood as a remittance of data implying no decision by the sending authority. At times, however, this dispatch of information goes together with a certain opinion, binding or not, on the legal assessment of that information, which complicates the legal assessment of the operation<sup>538</sup>.

The point of depart when looking at the case-law dealing with exchange of information is that the mere provision of information is not reviewable as it does not produce legal effects<sup>539</sup>. The main argument of the EU courts in this respect, similarly to the consideration of the preparatory acts, is that a mere transfer of information lacks

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<sup>538</sup> Hofmann, Rowe and Türk, *Administrative law and Policy...*, at 806.

<sup>539</sup> Case C-25/92 *Miethke / Parliament* [1993] ECR I-473; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, *Cimenteries CBR and Others / Commission* [1992] ECR II-2667, at paragraph 28; T-83/92 *Zunis Holding and Others / Commission* [1993] ECR II-1169, at paragraph 30; and Joined Cases T-3/00 and T-337/04, *Piristolas / Council and ECB* [2007] ECR II-4779, paragraphs 58-61.

binding legal effects<sup>540</sup>. In some particular occasions, however, the Court of Justice found that a request for transfer of information could be actionable. Thus, in *Deutsche Post*<sup>541</sup> an action for annulment was directed against the Commission's requests for information from the German authorities on the revenues and costs of Deutsche Post. Since it was considered that such request had autonomous legal effects<sup>542</sup> and the presumed illegality attaching to that measure could not be relied on in support of an action against the final decision, the action was declared admissible<sup>543</sup>.

However, the general rule is that exchange of information does not bind the decision-making authorities and is hence not subject to judicial review. That is not to say that there are no rules and principles regarding this exchange of information<sup>544</sup>. Besides some rules in specific areas, the duty of care and duty of diligent and impartial examination are considered general principles by the case-law<sup>545</sup>, besides the principle of good administration of Article 41(1) EChFR. However, all of these considerations apply when reviewing the final decision in a case in which the assessment of the information considered by the decision-making authority might be pertinent.

The application of this line of reasoning to composite procedures may result in obstacles for the full judicial review of the information that has been forwarded by a different level of administration from that that issued the final act. An enlightening case in this regard is *Sucrimex*<sup>546</sup> and some other cases related to refund of export

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<sup>540</sup> Case T-234/04, *Netherlands / Commission* [2007] ECR II-4589, at paragraph 61.

<sup>541</sup> C-463/10 P, *Deutsche Post and Germany / Commission* [2011] I-9639.

<sup>542</sup> It was held that an information under Article 10(3) of Regulation No 659/1999 produced independent legal effects.

<sup>543</sup> C-463/10 P, *Deutsche Post...*, at paragraphs 49-56.

<sup>544</sup> Hofmann, "Composite Decision Making...", at 140 and Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2006), at 375.

<sup>545</sup> For example, specific reference to this can be found in Case T-554/08, *Evropaiki Dynamiki / Commission*, [2012] not published in the ECR, at paragraph 56; Case T-211/02 *Tideland Signal / Commission* [2002] ECR II-3781, at paragraph 37; Case T-22/99, *Rose / Commission* [2000] ECR II-115, at paragraph 56; and Case T-231/97, *New Europe Consulting and Brown / Commission*, [1999] ECR II-2403, at paragraph 42.

<sup>546</sup> 133/79, *Sucrimex / Commission*, judgement of 27 March 1980 [1980] ECR 1300.

tariffs<sup>547</sup>, examined before<sup>548</sup>. Companies could request a refund of the duties to their respective national customs authorities. The information regarding the conditions of the refund lies within the Commission, so it is transferred to the competent national body together with a non-binding opinion. Such transfer is not reviewable, because it is not binding<sup>549</sup>. Nevertheless, it is essential for the decision of the national authority, and the national courts may be barred from reviewing the substance of a case, as it pertains to the EU level of administration.

The same pattern takes place in some procedures for the award of structural funds. The national authorities have the competence to decide on the allocation of some payments, but for this they rely on the information that the Commission submits, or even its suggestions of specific courses of action. Like in the previous cases, the Court of Justice has consistently rejected its competence to rule on the conduct of the Commission<sup>550</sup>.

The position of weakness of the individual in such cases is particularly visible in the context of an action for damages because the Commission cannot be held liable as the EU courts decline jurisdiction on the review of the transfer of information<sup>551</sup> and, at the national level, the competent body could also be exempted from responsibility if it had to rely exclusively on the information provided by the Commission.

As a result, the information transferred is not, with few limited exceptions, subject to the review of the Court of Justice. However, inasmuch as this information is

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<sup>547</sup> Joined Cases C-66/91 and C-66/91 R, *Emeralds Meats Ltd/ Commission* [1991] ECR I-1144, at paragraph 26; Case C-147/96 *Netherlands / Commission*, [2000] ECR I-4728, at paragraph 25; and Joined Cases T-225/07 and T-364/07, *Thomson Sales Europe / Commission*, [2009] ECR II-176, at paragraph 172.

<sup>548</sup> Section 5.2.3.

<sup>549</sup> See further in Lenaerts, Maselis and Gutman, *EU Procedural Law...*, at 260.

<sup>550</sup> T-54/96, *Oleifici Italiani SpA / Commission* [1998] ECR II-3380, at paragraph 51; T-166/98, *Cantina Sociale / Commission*, [2004] ECR II-3998, at paragraph 102; and Joined Cases T-121/96 and T-151/96, *MAAS / Commission*, [1997] ECR II-1357, at paragraph 42.

<sup>551</sup> Joined Cases T-93/00 and T-46/01, *Alessandrini and others / Commission*, [2003] ECR II-1639, at paragraph 61; Case T 92/06 *Lademporiki and Parousis & Sia / Commission*, [2006] (not published in the ECR), at paragraph 26; and T-212/06, *Bowland Dairy Products / Commission*, [2009] ECR II-4073, at paragraph 41.

deemed true and accurate by the decision-making authority it might lead to a wrong or unlawful final decision. When reviewing the final decision, the fact that the information came from a different administration might prevent not only the decision-making authority, but also the competent court, to assess the validity of that information.

At times, composite procedures have such a nature that even if the information of opinions exchanged do not have a binding character, they constitute the most essential element in the decision-making process and, consequently, the right of judicial review is not complete if those substantial elements cannot be covered by it. An example, in the inverse sense of the cases described just above, would be the procedure for the authorisation of chemicals analysed in the previous Chapter<sup>552</sup>. Under such procedure, the technical data and reports drafted by the national technical bodies do not bind the decision-making authority in the EU, but in practice it is inconceivable that the final decision departed from the conclusions following the technical assessment. In those circumstances, a case-law that only observes the binding character and the autonomous legal effects of an act of transmission of information fails to ensure the right of judicial review regarding composite procedures.

*(C) Third gap: standing to sue*

Even when an act is regarded as actionable, private parties still need to fulfil the requirements for access to the EU courts. As examined in a previous section<sup>553</sup>, the question of legal standing before the European Courts has a principal position in the academic reflections on the judicial architecture of the European Union<sup>554</sup>. The critical approach that many commentators express on the subject is equally applicable to composite procedures. The peculiarity of legal standing regarding composite procedure is twofold. Firstly, the fact that the allocation of different jurisdictions for the different acts throughout the administrative may result in a different legal

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<sup>552</sup> See section 4.4.6.

<sup>553</sup> Section 5.3.4.

<sup>554</sup> De Burca, “Fundamental Rights and Citizenship...”, at 26, and references of footnote 263.



standing, perhaps even a different procedural status, of private parties when trying to annul or claiming for damages in respect to an act resulting from a composite procedure; and secondly, the requirement of direct concern presents particular elements that render access to justice more complex in the context of composite procedures.

Those two elements are interlinked. As a general rule, an applicant has *locus standi* if the act is of direct and individual concern to him or her. As we analysed before, when it comes to the requirement of individual concern the strict *Plaumann* test is still applied in cases where the act is not addressed to the applicant, notwithstanding some novelties that the Treaty of Lisbon has brought about. In view of the restrictive conditions of legal standing, it appears as a logic option to applicants to seek for a judicial remedy at the national jurisdictions. As professor Türk argued "a more liberal interpretation of individual concern would have improved direct access to the Court and in many cases would have obviated the need to contest the validity of Community acts in the national courts."<sup>555</sup>. At the national level, the conditions for access to justice can be very different but, in any case, the problems encountered are analogous to those in the EU courts, namely, in upwards procedures the contribution by the national authorities can be a mere preparatory act and, thus non actionable, and in downwards procedures the national courts lack competence to rule on the EU input to the final decision subject to review.

#### Different conditions of access to justice at the national and Union level

The competent jurisdiction determines the conditions of access to justice. It goes without saying that the codes of administrative justice provide different rules of standing among Member States, but the question arises in the context of composite procedures with particular intensity. That is so because the intertwined co-operation which takes places between the different authorities imply that the choice of jurisdiction, which is largely uncertain and could be arbitrary, not only determines what judge will rule on the issue, but also whether or not the action is admissible at

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<sup>555</sup> Türk, "Judicial Review of Integrated...", at 230.

all. In a previous section<sup>556</sup> we analysed to what extent national rules on access to administrative justice differ and rely on different assumptions. It can be argued that in general terms that the strict requirements of legal standing for individuals in the context of EU law do not exist under such a rigorous conception in national jurisdictions.

Firstly, access to justice in administrative law is laxer in the case of countries that follow the French system. The basic idea is that a decision can be challenged not only by those individuals to whom the acts is addressed, but also by those whose rights are affected. Even individuals whose material or moral interest can be aggrieved have *locus standi* too<sup>557</sup>. In eclectic systems, like the Spanish law on the Administrative Justice procedure, all those having subjective rights and legitimate interests in the administrative act can challenge it, even if it has a general nature<sup>558</sup>. In the German system, actions can be brought in protection of subjective rights<sup>559</sup> just like in civil procedures<sup>560</sup>. Finally, in the British system, claims for judicial review can be brought by individuals according to the rules of civil procedures decisions,

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<sup>556</sup> Section 5.3.2.

<sup>557</sup> Fromont, “Droit Administratif des États...”, 165. See French Law n° 2000-321 of 12 April 2000, on the rights of the citizens in their relations with the administrations (Loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations), Official Journal of the French Republic n°88 du 13 avril 2000 page 5646, accessible at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005629288>.

<sup>558</sup> Article 19 of Law 29/1998 on the Contentious-Administrative Jurisdiction of 13 July 1998 (Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa) Spanish State Official Journal of 14 July 1998, 23516 accessible at <http://www.boe.es/boe/dias/1998/07/14/pdfs/A23516-23551.pdf>.

<sup>559</sup> Section 42 of the Code of Administrative Court Procedure in the version of the promulgation of 19 March 1991 (Verwaltungsgerichtsordnung), Federal Law Gazette I page 686, accessible in English at [http://www.gesetze-im-internet.de/englisch\\_vwgo/englisch\\_vwgo.html](http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html). This provision reads: “The rescission of an administrative act, as well as sentencing to issue a rejected or omitted administrative act can be requested by means of an action. Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission.”

<sup>560</sup> Fromont, “Droit Administratif des États...”, at 177-178. Actions against acts of general application are different and much more restricted.

actions or failures to act in relation to the exercise of a public function<sup>561</sup>. They are therefore put at the same level and with the same conditions as civil actions<sup>562</sup>.

In sum, all the major European systems of administrative justice provide for more liberal rules on access to justice than those of the European courts. Perhaps paradoxically for this reason, some Directives require an even wider legal standing before national jurisdictions, in particular in the area of environmental protection<sup>563</sup>. The discrepancy between the national and EU rules on the conditions for legal standing could also relate to the concepts discussed in the previous section, that is, the definition of reviewable acts. Although it is difficult to say that this inconsistency is *per se* a violation of the right of judicial access at the moment, this further adds complexity to the conditions for the exercise of the right of judicial review in the context of composite procedures. In a situation where the determination of the competent court to adjudicate on one's claim remains unclear, the existence of very different standards to gain access to the courts constitutes an additional reason to urge for comprehensive mechanisms for a fair and consistent access to justice.

#### Uncertain definition of direct concern in the context of composite procedures

An additional aspect that must be underlined stems from the lack of consistent determination of one of the main conditions for legal standing before the EU courts, namely direct concern. Besides the lack of coordination between the national and European courts and the lack of equal access to administrative justice among the Member States, there are particular aspects with regard to EU law concerning

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<sup>561</sup> Section 54.1(2) of the Civil Procedure Rules of 10 December 1998 (SI 1998/3132), accessible at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules#part51>, states that “a ‘claim for judicial review’ means a claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function”.

<sup>562</sup> Fromont, “Droit Administratif des États...”, 192.

<sup>563</sup> The main example of this “democratization” of conditions for access to justice is the Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and with regard to public participation and access to justice, (OJ 2003 L 156, 17–25). In particular article 15a states: “Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law (...). To this end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article.”

composite procedures specifically. The requirement of direct concern, usually less controversial than individual concern, does raise specific questions in the framework of composite procedures. The Court of Justice has consistently argued that direct concern implies that the act “must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.”<sup>564</sup>

This statement can be problematic in case of a European act to be implemented by national authorities or in co-operation between them and EU authorities, or where a EU acts authorises or empowers national authorities to take a particular course of action, or, finally, where the Union grants funds to individuals with the intervention of national authorities<sup>565</sup>. The standard of whether or not an act can be challenged as it is of direct concern to the applicant cannot be determined on formalistic grounds only. There is a consistent case-law of the Court of Justice underlining that the emphasis must be placed on the substance of the measure, not on its form or *nomen iuris*<sup>566</sup>. With regard to composite procedures, the core of the problem lies in determining whether an EU act does indeed affect the legal situation of the plaintiff or it is the national or joint implementing act which does. Two different situations can be told apart when analysing the case-law of the Court of Justice. Additionally, borderline cases where the CFI and the Court of Justice disagreed show the fragility of the rationale behind the case-law.

a) Prior decision of the Union, implemented or carried over by the national authorities

The case-law of the Court of Justice determines that the relevant criterion for the concurrence of direct effect is whether the implementing authorities have discretion in the matter.

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<sup>564</sup> Case C-386/96 P, *Dreyfus / Commission* [1998] ECR I-2309, at paragraph 43; Case 92/78 *Simmenthal / Commission* [1979] ECR 777, at paragraphs 25 and 26; Case 113/77 *NTN Toyo Bearing Company and Others / Council* [1979] ECR 1185, at paragraphs 11 and 12; Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others / Commission and Council* [1985] ECR 2523, at paragraph 31; Case 55/86 *Arposol / Council* [1988] ECR 13, paragraphs 11 to 13; and Case C-152/88 *Sofrimport / Commission*, [1990] ECR I-2477, paragraph 9.

<sup>565</sup> Türk, “Judicial Review of Integrated...”, at 231.

<sup>566</sup> Case C-10/95 P, *Asocarne / Council*, [1995] ECR I-4151, at paragraph 31

The paradigm of the situation where there is that lack of discretion is *International Fruit*<sup>567</sup>. According to the procedure in that case<sup>568</sup> the Commission had to decide on the award of import licences for certain foodstuffs, which were issued by national authorities to specific companies. The system worked in the following way; import licences of certain products were granted to the extent to which the state of the Community market allowed. Member States had to report periodically the number of license requests in their respective territory. With that information, the Commission had to establish the criteria and detail the reference quantities for the award of licences<sup>569</sup>. Although the reference quantities that operated as a limit were fixed in a general way for each country, the Commission decided in practice "on the fate of the subsequent requests for licences", even though the refusals were communicated by the national authorities. The Court of Justice understood that "the national authorities do not enjoy any discretion in the matter of the issue of licences and the conditions on which applications by the parties concerned should be granted"<sup>570</sup>, so it ruled that the plaintiff had standing before the court and that the EU act was actionable.

This interpretation based on the lack of discretion was subsequently developed in later cases. The judgement in *Weddel*<sup>571</sup> provides another good example. A beef importer from the Netherlands challenged the Commission Regulation<sup>572</sup> that mandated the reduction of the import licences relative to quantities requested, and which was applied by the national agency in charge to the detriment of the applicant<sup>573</sup>. The Court of Justice spelt out that since the EU act in question fixed in great detail the criteria on the basis of which import licences must be granted, the agencies of the Member States do not enjoy any discretion and the EU act is of direct

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<sup>567</sup> Joined Cases 41/70 to 44/70 *International Fruit / Commission* [1971] ECR 412.

<sup>568</sup> Commission Regulation No 459/70 of 11 March 1970 adopting protective measures applicable to the import of dessert apples, (OJ 1970 L 57, 1).

<sup>569</sup> *Ibid.* at paragraph 5-14.

<sup>570</sup> *Ibid.*, at paragraph 25.

<sup>571</sup> Case C-354/87, *Weddel / Commission*, [1990] ECR I-3847.

<sup>572</sup> Commission Regulation (EEC) No 2806/87 of 18 September 1987 on the issue of import licences for high-quality fresh, chilled or frozen beef and veal (OJ 1987 L 268).

<sup>573</sup> C-354/87, *Weddel...*, at paragraphs 11-12.

concern to the applicant<sup>574</sup>. The same reasoning was applied to other cases in the field<sup>575</sup>.

However, in other cases, the Court of Justice accepted the fulfilment of the requirement of direct concern even when the national authorities enjoyed some discretion<sup>576</sup>. In *Bock*<sup>577</sup>, the applicant was denied an import licence by the German authorities. The national authorities had received an authorisation by the Commission to take protective measures, although, in the specific case they had the discretion not to take them, they had warned the applicant that they would reject the application if they received the application by the Commission<sup>578</sup>. The action against the decision of the Commission was declared admissible in this case.

Perhaps more interestingly, the *Piraiki-Patraiki*<sup>579</sup> case involved several Greek cotton undertakings who challenged a Commission decision<sup>580</sup> authorising France to impose a temporary quota system on Greek exporters following the accession Treaty of Greece. As it could be expected, the Commission, and France, argued that the decision had a general nature, even though the applicants were indirectly affected by it<sup>581</sup>. They stressed that the decision simply gave France the freedom to institute a quota system, but left it the discretion to apply it or not<sup>582</sup>. However, the circumstances of the case were that the French authorities had implicitly made clear how that they would take the restrictive measure in case they were authorised<sup>583</sup>. The Court of Justice argued that:

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<sup>574</sup> *Ibid.*, at paragraph 19.

<sup>575</sup> Case C-152/88, *Sofrimport / Commission* [1990] ECR I-2477; and C-300/00 P, *Federación de Cofradías de Pescadores de Guipúzcoa and Others / Council* [2000] I-8797.

<sup>576</sup> Albor-Llorens, *Private Parties in European Community Law...*, at 68.

<sup>577</sup> Case 62/70 *Bock / Commission*, [1971] ECR 897.

<sup>578</sup> *Ibid.*, at paragraph 9.

<sup>579</sup> Case 11/82, *Piraiki-Patraiki / Commission*, [1985] ECR 207.

<sup>580</sup> Commission decision No 81/988/EEC of 30 October 1981 (OJ 1981 L 362 ).

<sup>581</sup> 11/82, *Piraiki-Patraiki...*, at paragraph 3.

<sup>582</sup> *Ibid.*, at paragraph 6.

<sup>583</sup> Türk, "Judicial Review of Integrated...", at 231.

"the possibility that the French Republic might decide not to make use of the authorization granted to it by the Commission decision was entirely theoretical, since there could be no doubt as to the intention of the French authorities to apply the decision"<sup>584</sup>.

Moreover, Advocate General VerLoren van Themaat had stated in his opinion that direct concern:

"is defined as being of direct material concern to an interested party if, even though it requires the adoption of a further national implementing measure, it is possible to foresee with certainty or with a high degree of probability that the implementing measure will affect the applicant". It is apparent from those arguments that the Court was reasoning beyond mere legal considerations and concentrating on the facts. Such position is, certainly, more favourable to wider access to the courts for individuals but does little to provide legal certainty on the standing of private parties in administrative procedures where several administrations intervene"<sup>585</sup>.

There are subsequent cases in which the CFI<sup>586</sup> provided with more details on the interpretation of direct concern in similar situations. Still, the judicial concept of direct concern and, more generally, the conditions under which individuals can challenge an act of the EU in the context of an administrative procedure where national administrations intervene remains far from straightforward.

#### b) *Ex-post* authorisation by the Union of a national decision

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<sup>584</sup> 11/82, *Piraiki-Patraiki...*, at paragraph 9.

<sup>585</sup> Some commentators understand that this case was special and the considerations it makes cannot constitute a general claim on the conditions for access to justice. Lorna Woods and Philippa Watson, *EU Law*, Oxford University Press (Oxford, 2014), at 280. Still, it is evident from this case and some others that the definition of the conditions for access to justice in the case of composite procedures remains ambiguous.

<sup>586</sup> Case T-295/04, *ASAJA / Council* [2005] ECR II-3151, at paragraph 42; T-127/05, *Lootus Teine Osaiühing / Council* [2007] ECR I-4619, at paragraph 47; T-46/06, *Galileo / Commission* [2007] ECR II-93\*, at paragraph 43; T-172/07, *Atlantic Dawn / Commission*, [2008] ECR II-83\*, at paragraph 47; and T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe / Commission* [2012] (ECLI:EU:T:2012:300), at paragraph 45.



The position of the EU court in the inverse case remains more controversial. In the early case *Toeffer*<sup>587</sup>, the Commission had taken the decision to grant Germany a retroactive authorisation to maintain a protected measure already approved by Germany. Advocate General Roemer argued that the applicants were not directly concerned by the decision, because Germany was free to revoke the measure at its discretion<sup>588</sup>. The position of the Court of Justice was different. It considered that the Commission's decision to allow Germany to keep the measures rendered them valid and thus had direct legal effects on the applicants<sup>589</sup>.

By contrast, in *DSTV*<sup>590</sup> the Commission took a decision to declare an order by the British authorities (the banning of a TV programme broadcast from Denmark) compatible with Community law. This was not, according to the CFI, a retroactive authorisation by the Commission<sup>591</sup>, so the action was declared inadmissible. In subsequent cases, the CFI kept the view that *ex post* authorisations were not of direct concern to the applicants unless they had retroactive effect<sup>592</sup>, a position confirmed by the Court of Justice<sup>593</sup>.

By the same token, the Court of Justice has also accepted direct concern in case of a Commission decision to confirm a measure taken by national authorities<sup>594</sup>,

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<sup>587</sup> Joined Cases 106/63 and 107/63, *Toeffer / Commission* [1965] ECR 405. For a detailed analysis of the case and how the Court of Justice and the AG reasoned in term of the individualisation of the measure see Gerhard Bebr, *Development of Judicial Control of the European Communities*, Martinus Nijhoff Publishers (Dordreg 1981), at 70.

<sup>588</sup> Opinion of AG Roemer in Joined Cases 106/63 and 107/63, *Toeffer / Commission* [1965] ECR 416, at page 418.

<sup>589</sup> Joined Cases 106/63 and 107/63, *Toeffer...*, at page 411.

<sup>590</sup> Case T-69/99, *DSTV / Commission*, [2000] ECR I-4039.

<sup>591</sup> *Ibid.* at paragraph 28, and Türk, “Judicial Review of Integrated...”, at 235.

<sup>592</sup> T-348/03, *Koninklijke Friesland Foods / Commission* [2007] ECR II-101\*, at paragraph 93; T-185/08, *VDH Projektentwicklung and Edeka Rhein-Ruhr / Commission* [2008] ECR II-98\*, at paragraph 11; T-208/07, *BOT Elektrownia Bełchatów and Others / Commission* [2008] ECR II-225\*; and T-203/07, *Cemex Polska / Commission* [2008] ECR II-194\*.

<sup>593</sup> C-387/08 P, *VDH Projektentwicklung and Edeka Rhein-Ruhr / Commission* [2009] ECR I-56\*.

<sup>594</sup> Joined Cases 106/63 and 107/63, *Toeffer / Commission*, [1965] ECR 405.

but only if it had retroactive effect<sup>595</sup>. Otherwise, the CFI did not consider that there was direct concern<sup>596</sup>.

c) Disagreement between the EU courts

The uncertainty of the definition of the conditions for direct concern in the context of composite procedures is best illustrated by cases where there a fundamental disagreement between the CFI and the Court of Justice, in opposite direction in each of the cases.

The first is *Comafrica*<sup>597</sup>, which concerned a then recently enacted regulation on the import of bananas<sup>598</sup>. Two companies sought the annulment of the Commission's regulation fixing a reduction coefficient enabling the importers in question to determine the quantity which will be allocated to them, reduced relative to the previous year's<sup>599</sup>. This Commission's regulation had to be executed by Member States authorities, who would make an arithmetical operation as provided in the regulation and apply the reduction to the operators. The CFI argued that such regulation did not allow Member States any margin of discretion in relation to the issue of import licences, so it was of direct concern to the operators<sup>600</sup>.

The Court of Justice took a completely different stance<sup>601</sup>. Advocate General Mischo<sup>602</sup> infers that the reasoning of the CFI was based on the previous ruling in

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<sup>595</sup> Türk, "Judicial Review of Integrated...", at 235.

<sup>596</sup> Case T-130/06, *Drax Power / Commission* [2007] ECR II-67; Case T-13/07, *Cemez UK Cement / Commission* [2007] ECR II-146; and Case T-27/07, *US Steel Kosice / Commission* [2007] ECR II-128.

<sup>597</sup> Case T-70/94, *Comafrica / Commission* [1996] ECR II-1741. Apart from the interest of the case for showing the uncertainty of the conditions under which applicant can access the EU courts in the context of composite procedures, some commentators have pointed out that it is an exceptional case inasmuch as a regulation was challenged directly by individuals, and the actions declared admissible by the CFI, see David O'Keeffe, and Antonio Bavasso, *Judicial Review in European Union Law*, Volume 1, Kluwer Law (The Hague, 2000), at 99.

<sup>598</sup> Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 L 47), and Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142).

<sup>599</sup> Case T-70/94, *Comafrica*..., at paragraph 21.

<sup>600</sup> *Ibis.*, at paragraph 41.

<sup>601</sup> Case C-73/97 P, *France / Comafrica* [1999] ECR I-207.

*Weddel*<sup>603</sup> (which concerned beef products) because it was possible for each operator to determine the final quantity which he would be entitled to import by simply multiplying a quantity known to him by the reduction coefficient<sup>604</sup>. However, the rules on the banana market were slightly more complicated involving the origin of the products and the economic activities involved. Due to this complexity, it was Member States authorities that determined the final quantities and economic operators were not themselves in a position to make the arithmetic calculations<sup>605</sup>. The complexity of the system, it was argued, impeded the existence of direct concern regarding the Commission's regulation. The Court of Justice followed the Opinion of the Advocate General and interpreted that that role of national authorities went beyond the mere application of coefficients and declared the actions inadmissible<sup>606</sup>.

By contrast, in *Glencore Grain*<sup>607</sup> the situation was the opposite. The case concerned a loan agreement signed by the European Community and the Ukraine, aimed at providing food aid to the latter, though the financing of purchases of agricultural products. After a public procurement procedure, the Ukrainian agency in charge decided to contract a supply of wheat with a provider that was not offering the most competitive price among the candidates. The Commission decided not to approve the contract, which had already been signed between the applicant and the Ukrainian authorities. This implied that no assistance would be granted to finance the contract. The applicant challenged this refusal to approve in the form of a letter. The CFI considered that the Commission's role was merely to verify that the conditions for Community financing were fulfilled and, where necessary, to acknowledge, for the purposes of disbursement of the loan, that such contracts were in conformity with the corresponding provisions. Consequently, the CFI considered that the Commission did not have any legal relations with the applicant and consequently the action of the Commission did not directly affect the legal validity of the commercial contract

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<sup>602</sup> Opinion of AG Mischo in Case C-73/97 P, *France / Comafrika* [1999] ECR I-187.

<sup>603</sup> Case C-354/87, *Weddel / Commission*, [1990] ECR I-3847.

<sup>604</sup> *Ibid.* at paragraphs 25 and 26.

<sup>605</sup> *Ibid.* at paragraphs 38 and 39.

<sup>606</sup> Case C-73/97 P, *Comafrika*..., at paragraph 38.

<sup>607</sup> Case T-509/93, *Richco / Commission*, [1996] ECR II-1181. The Facts of the case fall within the scope of agreements with third countries, rather than implementation by Member States, but the debate over the concept of discretion in implementation is likewise applicable for the purposes of our study.

concluded<sup>608</sup>. That being said, the CFI acknowledged that due to the Commission's denial, the Ukrainian authorities were not able to pay for the supplies<sup>609</sup> and that there was a suspensory clause making the performance of the contract and payment of the contract price subject to acknowledgement by the Commission<sup>610</sup>. Despite these considerations, the CFI dismissed the action as inadmissible.

When the judgement of the CFI was appealed, the Court of Justice adopted a far more liberal approach<sup>611</sup>. It contradicted the CFI because it considered that the Commission's refusal to approve directly affected the legal situation of the individual and left no discretion to the addressees of the measure<sup>612</sup>. Even though the Commission was not directly part in the dealings between the applicant and Ukrainian agency, the validity of the supply contract at issue was subject to the suspensory condition of recognition by the Commission of conformity of the contract, a detail which is corroborated by the socio-economic context in which the supply contract was concluded<sup>613</sup>. The effect of the refusal by the Commission was that the applicant was deprived of the possibility of performing the contract awarded to it or of obtaining payment for supplies<sup>614</sup>. As a result, it referred the case back to the CFI for judgement on the substance<sup>615</sup>.

The disagreement between the EU courts in the cases *Comafrika* and *Glencore Grain* illustrates quite notoriously that the notion of discretion as the principal criterion for direct concern is not clear. Composite procedures and situations where several public administrations intervene put into question the conditions that the Court requires to enjoy legal standing. Similarly to the previous considerations, the lack of a

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<sup>608</sup> *Ibid.* at paragraphs 42 and 43.

<sup>609</sup> *Ibid.* at paragraph 45.

<sup>610</sup> *Ibid.* at paragraph 47.

<sup>611</sup> Case C-404/96 P, *Glencore Grain / Commission* [1998] ECR I-2435. Because it was a difficult case, the detailed considerations of this ruling made it apt to be cited as a milestone in the new definition of direct concern, see Lenaerts, Maselis and Gutman, *EU Procedural Law...*, at 323.

<sup>612</sup> *Ibid.* at paragraph 41.

<sup>613</sup> *Ibid.* at paragraphs 46 and 47.

<sup>614</sup> *Ibid.* at paragraph 51.

<sup>615</sup> The CFI would later dismiss the action when it ruled on the substance of the case. Case T-509/93, *Glencore Grain / Commission* [2000] ECR II-3697.

uniform approach of composite procedures is at the origin of this case-by-case approach which is not always consistent or straightforward.

#### ***5.4.- Conclusions***

Composite procedures give rise to a number of legal challenges that have not been dealt with by the EU courts satisfactorily. These challenges concern the basic procedural rights of the individual a) before the administrative decision is taken, namely the right to be heard; b) when the decision is taken, namely the administration's duty to state reasons; and c) after the decision is taken, namely the right to challenge such decision before an independent court.

The breaches of the procedural rights assessed in this Chapter affect fundamental rights. The position of the private parties is undermined due to the complexities of composite procedures. The Court of Justice, when called to rule on such situations, has failed to provide a comprehensive, satisfactory solution. In most cases, however, the EU courts did not have the tools to provide for such solution, without invading the competences of national courts or assuming powers of review on national administrative authorities.

In overview, the structural legal problems that composite procedures bring about have not been adequately identified by the EU courts. They have reasoned on a case-by-case basis, incurring in contradictions between different policy areas, as it is notably the case of the right to be heard, or attributing responsibilities to national courts even when national procedural laws would have prevented them from being competent. The dysfunctionalities become apparent in many situations and the EU courts, and national courts, are unable to cope with them in an effective fashion.

The lack of a general legal framework for composite procedures is very problematic as we have seen in this Chapter. The position of the individual as a concerned party affected by composite procedures was largely ignored at the time the procedures were set up. This only reinforces the message that a comprehensive legal framework is necessary and that it should take into account the peculiarities of

composite procedures and ensure that the same standards of protection of procedural rights are awarded.

Concerning the right to be heard and the duty to state reasons, it is important to realise that these are guarantees *vis-à-vis* public administration because the latter is in a position to make a discretionary decision that affects an individual. For this reason, relinquishing the exercise of the right to be heard at an administrative authority different to that which takes the discretionary decision would place the individual in a position of weakness. Likewise, relying on a statement of reasons taken at another administrative level might be problematic in establishing the reasons why the administration with discretionary power decided in a certain fashion. As we have analysed, there are many cases where such guarantees were not respected.

The shortcomings are greater and more important in the context of access to justice. The determination of the competent judge in procedures where different administrative authorities participate is difficult and leads sometimes to situations where the right to an effective judicial remedy is neglected. In this case, a general provision indicating clearly the competence of both national and EU courts is required. However, in this case, the solutions must be more comprehensive. The shortcomings in this area sometimes stem from the fact that the competent court is not able to review the validity of a decision taken by administrative authorities outside its jurisdiction. The preliminary ruling procedure may be adequate when a national judge has a doubt on the decision taken by the Commission, for example, but this mechanism is not foreseen inversely. What is more, horizontal composite procedures, based on the logic of mutual recognition, can result very problematic in the allocation of responsibilities and discretionary powers.

Any coherent system of reviewability of administrative decisions presupposes a common notion of ‘reviewable act’ and the conditions to enjoy legal standing to challenge such acts. The lack of a common general framework to determine this procedural requirement to access a judicial procedure further adds to the complexity of composite procedures creating further gaps in protection for individuals.

The Court of Justice argues in terms of division of powers, but this division is rather a legal fiction, and it eludes the reality of an integrated administration. The Court of Justice is not to blame, it could certainly make its interpretation more flexible in some aspects, but the instruments to face the challenges of composite procedures are not sufficient. One can argue that, at present, the requirements of a complete legal system under the principle of the rule of law -solemnly proclaimed by the Court of Justice- are not met.





## CHAPTER 6

### Proposals

6.1.- Initial remarks

6.2.- Regulation of composite procedures in a General Act on EU administrative procedures

*6.2.1.- The General Act on EU administrative procedures: arguments in favour of a codification*

*6.2.2.- The state of play of the process of codification*

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6.3.- Inverse preliminary ruling procedure

*6.3.1.- The preliminary ruling procedure and its functions*

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6.4.- Conclusions

## **6.1.- Initial remarks**

The complex nature of composite procedures and the lack of a systematic legal framework applicable to them bring about several legal concerns. These concerns were identified in the previous Chapter. In most cases, these problems stem from the fact that the legal tools available to the individual *vis-à-vis* the EU public administration are limited. These instruments, in the form of procedural rights, have not been adapted to a phenomenon based on intense procedural cooperation between EU and Member States authorities.

In this Chapter, we will put forward and describe solutions to challenges described before. The greatest challenge to any proposal in this vein is that it will have to be comprehensive and leave no room for the vacuum in legal protection of the individual that we described in the previous Chapter. This task is difficult in view of the lack of a general conception, let alone a general legal framework, of composite procedures.

For this reason, the main proposal has to be related to the enactment of a general legal framework for administrative procedures in the European Union. It is essential that this legal framework includes particular rules on composite procedures, because it is a special category of procedure for which the general rules are, more than in other administrative procedures, insufficient or inappropriate.

Some of the recent regulations laying down composite procedures in some of the fields examined in Chapter 4 provide partial solutions to some of the problems identified. While this approach shall be welcome and, moreover, it constitutes a source of inspiration on more far-reaching general proposals, it is fragmentary and insufficient. The focus of this research will be placed on the comprehensive response to the challenges of composite procedures, something that both sector-specific regulations but also the case-law of the Court of Justice have failed to provide.

A common framework and a legal categorisation would precisely contribute to a comprehensive approach by the EU courts on the controversies related to aspects of composite procedures. The analysis of the case-law in the context of composite procedures provides evidence that the EU courts, failing to see the common elements of different controversies related to composite procedures, have provided only individual responses, and have incurred in inconsistencies.

In addition to specific provisions in a new code of European administrative procedure, the solutions to the lacunae would require enhanced cooperation between the national and EU judicial systems. A scheme of intertwined administrative cooperation requires a counterpart system of cooperation between the Union and national judges. This cooperation exists in one direction, *i.e.* the preliminary ruling procedure, but not in the inverse direction. The situation where the EU courts are competent to rule on the validity of a decision but lack any competence to rule on the legality of essential steps taken by national public administrations and to ask the national courts to rule on it, leads to a legal dead end, as we had to opportunity to see in the previous Chapter.

This second proposal would have more limited effects. In view of the lack of scholarly analysis of such proposal, it can be deemed innovative and probably difficult to implement in practice. While aware of the ambitious character of these proposals, it would be intellectually frustrating if we failed to cover all the possible breaches in legal protection identified in the previous Chapter.

The essence of the problems highlighted stem from old conceptions that have not been changed in parallel to the reality of the proliferation and intensity of composite procedures, a phenomenon that is likely to increase in the future. Hence, the proposals to overcome the asymmetry need be visionary.

## ***6.2.- Regulation of composite procedures in a General Act on EU administrative procedures***

### *6.2.1.- The General Act on EU administrative procedures: arguments in favour of a codification*

As explained in Chapter 2<sup>1</sup>, the codification of administrative procedures has a prominent position in the academic debate in the field of EU administrative law at the moment. Professor Schwarze pioneered the idea of a European codification of administrative procedure several decades ago<sup>2</sup>. Such an idea was developed and discussed by scholars in the 1990's<sup>3</sup> together with the renewed study of EU administrative law as a separate field of EU law.

Codification is a legal concept used by historians of Law to identify the process of drafting of an act or a code incorporating the most general rules on a certain subject matter<sup>4</sup>. Although there might be different nuances among the different countries, the essential element of the codification of administrative procedures is the enactment of a general act of administrative procedure, a phenomenon that has taken place in most EU Member States throughout the 20th Century, but not in all<sup>5</sup>. In the context of the EU law, codification of administrative procedures refers thus to the enactment of a Regulation on EU administrative procedures.

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<sup>1</sup> Section 2.4.5.

<sup>2</sup> Jürgen Schwarze, *Europäisches Verwaltungsrecht*, Nomos (Cologne, 1988), at 1397.

<sup>3</sup> Martin Shapiro, "Codification of Administrative Law: The US and the Union", 2(1) *European Law Journal* (1996), 26-47; Carol Harlow, "Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot", 2(1) *European Law Journal* (1996), 3-25; Wolfgang Kahl, "Hat die EG die Kompetenz zur Regelung des Allgemeinen Verwaltungsrechts?", *Neue Zeitschrift für Verwaltungsrecht* (1996), 865-69; Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law*, Hart Publishing (Oxford, 1999) at 169.

<sup>4</sup> Francisco Tomás y Valiente, *Manuel de historia del Derecho Espanol*, vol. 2, Centro de Estudios políticos y constitucionales (Madrid, 1997), at 1401.

<sup>5</sup> Jean-Bernard Auby, *Codification of Administrative Procedure*, Bruylant (Brussels, 2013), at 5. In particular, Member States with a general act of administrative procedure include Austria, Bulgaria, Croatia, Czech Republic, Germany, Estonia, Finland, Denmark, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Spain and Sweden. The exception is the United Kingdom, Ireland, Belgium and France. See section 3.3.2. and 3.3.3.

Since the entry into force of the Treaty of Lisbon, academic debate on the possibility and the convenience of a Regulation on EU administrative procedures has been reinvigorated following the inclusion in primary law of a legal basis for an act of administrative procedure. Before the Treaty of Lisbon, it was hard to argue for such codification without a proper legal basis<sup>6</sup>. At the moment, Article 298 TFEU, which calls for an open, efficient and independent European administration, is deemed by most scholars<sup>7</sup> as an appropriate legal basis for a Regulation with a general framework on administrative procedures, complemented with Article 41 ChFR. For some authors, Article 298 TFEU is more than a legal basis; it constitutes a mandate to the legislator for a general codification of administrative procedures<sup>8</sup>.

Besides the formal argument related to the existence of a legal basis, the need for codification is linked to the emergence and consitutionalization of a EU public administration. This phenomenon was analysed at large in Chapter 2. The new Article 298 gives the EU administration due visibility and constitutional anchorage<sup>9</sup>. In view of the existence of such administration, some scholars argue, only a general act on EU administrative procedure can establish applicable provisions for every administrative action

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<sup>6</sup> Mariolina Eliantonio, "The Future of National Procedural Law in Europe: Harmonisation vs. Judge-Made Standards in the Field of Administrative Justice", 8 *Maastricht Faculty of Law Working Paper* (2008), 1- 18, at 16; and Kahl, "Hat die EG die Kompetenz ..." at 866. However, even before the Treaty of Lisbon, some scholars had advocated for the subsidiary legal basis of the old Article 308 TEC, see Giacinto della Cananena, "From Judges to Legislators? The Codification of EC Administrative procedures in the Field of State Aid", 5 *Rivista italiana di diritto pubblico comunitario* (1995), 967-980, at 979.

<sup>7</sup> Paul Craig, *EU Administrative Law*, Oxford University Press (Oxford, 2012), at 323; and Bernardo Giorgio Mattarella, "The Concrete Options for a Law on Administrative Procedure bearing on Direct EU Administration", 3-4 *Rivista italiana di diritto pubblico comunitario* (2012), 537-45, at 538.

<sup>8</sup> Clemens Ladenburger, "Evolution oder Kodifikation eines allgemeinen Verwaltungsrechts in der EU", in Hans-Heinrich Trute, Thomas Gross, Hans Christian Röhl, and Chistian Möllers (coords.), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts*, Mohr Siebeck (Tubingen, 2008), 109-33, at 119; and Oriol Mir-Puigpelat, "Razones para una codificación general del procedimiento de la administración de la Unión", in Mercedes Fuertes (ed.), *Un Procedimiento Administrativo para Europa*, Aranzadi (Pamplona, 2012), 131-65, at 138. Notwithstanding, professor Mir-Puigpelat acknowledges that general codification is not the only option provided in Article 298, and partial codification or regulations by sectors could also fulfil the purpose of this provision, though, arguably, not so satisfactorily.

<sup>9</sup> "Arguments in favour of a general codification of the procedures applicable to EU administration", Briefing Note of the Policy Department C: Citizens' Rights and Constitutional Affairs, at 7, available at [http://www.europarl.europa.eu/RegData/etudes/note/join/2011/432776/IPOL-JURI\\_NT%282011%29432776\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2011/432776/IPOL-JURI_NT%282011%29432776_EN.pdf)

and measure taken at the EU level<sup>10</sup>. The legal certainty attained by codification could not be achieved by the addition of sector-specific procedural regulations. A general norm on the administrative procedure applicable in the absence of other special rules, would indeed be the most suitable mechanism to guarantee the principle of legality in all the actions of the EU administration or, in other words, the rule of law principle in the activities of this EU public administration. Not less importantly, the efficiency of the administrative action would also be boosted by such act<sup>11</sup>.

Another perspective from which the codification of administrative procedures can be advocated is that of the rights of the individual<sup>12</sup> as well as the other principles of administrative law established by the case law of the Court of Justice<sup>13</sup>, the most relevant of which would be the right to a good administration enshrined in Article 41 ChFR. The gist of the right to a good administration consists on an array of guarantees to the individual *vis-à-vis* the public administration<sup>14</sup>. The link between the right to a good administration and the respect of procedural guarantees and clear rules on the administrative procedure can be identified in the statement by Advocate General Trstenjak that this right "is used as a synonym for those principles which make up administrative procedure based on the rule of law"<sup>15</sup>. The homogenization of procedural guarantees stemming from a general act of

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<sup>10</sup> Isaac Martin Delgado, "Hacia una norma europea de procedimiento administrativo", in Isaac Martín Delgado and Eva Nieto Garrido (eds.), *Derecho Administrativo Europeo en el Tratado de Lisboa*, Marcial Pons (Madrid, 2010), 149-97, at 178.

<sup>11</sup> Craig, *European Administrative Law...*, at 278.

<sup>12</sup> Martin Delgado, "Hacia una norma europea...", at 173. While the fundamental rights approach is one of the more powerful legal arguments to advocate for the codification of administrative procedures, it does not constitute *per se* a sufficient legal basis or the conferral of powers to the Union to enact a regulation given that Article 51(2) ChFR reads: " 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

<sup>13</sup> See Section 3.4.4.

<sup>14</sup> Diana-Urania Galetta, "Il diritto ad una buona amministrazione europea come fonte di essenziali garanzie procedurali nei confronti della Pubblica Amministrazione", in 3 *Rivista italiana di diritto pubblico comunitario* (2005), 819-57, at 855; and Klara Kanska, "Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights", 10(3) *European Law Journal* (2004), 296-326, at 300.

<sup>15</sup> Opinion of Advocate General Trstenjak delivered on 11 September 2008, in case C-308/07 P, *Koldo Gorostiaga Atxalandabaso / European Parliament*, [2009] ECR I-1059, cited in Martin Delgado, "Hacia una norma europea...", at 174.



administrative procedures would prove appropriate to improve the rights of the individuals in the context of the decisions and actions of the public administration<sup>16</sup>.

Codification would arguably bring more coherence to the regulation of administrative procedures, in particular in a time where more and more administrative procedures are being established by sector-specific Regulations<sup>17</sup>. The existing fragmentation leads to two consequences: different treatment of certain issues without a justification and gaps that require recourse to analogies and/or the application of general principles<sup>18</sup>. For example, agencies apply their own regulations in the procedures they follow, a factor that has been identified by the Commission as leading to inconsistencies which should be overcome<sup>19</sup>. While the case-law of the Court of Justice has contributed to a coherent set of principles of administrative law, the courts of the Union do not have the necessary instruments and perspective to create a complete and consistent body of procedural rules<sup>20</sup>.

Although the process of codification can be used to incorporate innovation, its essence consists on putting rules currently found in a variety of sources, into a single legal instrument, in the form of a Regulation. A source, at times very comprehensive in its scope, but very weak in its legal force, of general rules on administrative procedures are the Codes of Good Administrative Behaviour<sup>21</sup>. However valuable in terms of their goals and their indicative

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<sup>16</sup> Mir-Puigpelat, "Razones para una codificación ...", at 153.

<sup>17</sup> Jens-Peter Schneider, "Estructuras de la Unión Administrativa Europea – Observaciones introductorias", in Jens-Peter Schneider, and Francisco Velasco Caballero, *La unión administrativa europea*, Marcial Pons (Madrid, 2008), 25-50, at 38.

<sup>18</sup> Mir Puigpelat, "Razones para una codificación ...", at 146.

<sup>19</sup> Communication from the Commission to the European Parliament and the Council. European agencies – The way forward COM(2008) 135 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0135&from=EN>

<sup>20</sup> Giacinto della Cananea, "I procedimenti amministrativi comunitari", in Mario P. Chiti and Guido Greco (dirs.), *Trattato di diritto amministrativo comunitario vol. I*, Giuffrè, (Milan, 1998), 225-251, at 247; and "Arguments in favour of a general ...", Briefing Note, at 165.

<sup>21</sup> The most important of these codes is the one established by the European ombudsman, available at [www.ombudsman.europa.eu/en/resources/code.faces#/page/1](http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1); but the different institutions have adopted other codes, like the Commission, and some agencies have done likewise. For the Commission, it is the Commission Decision 2000/633/EC, ECSC, Euratom of 17 October 2000 amending its Rules of Procedure by annexing a Code of Good Administrative behaviour for staff of the European Commission in their relations with the Public

character for future developments of the law<sup>22</sup>, many scholars consider these instruments insufficient and improper to a public administration as developed as that of the EU<sup>23</sup>. The transformation of these *soft law* instruments into binding law is the appropriate process to enforce administrative fundamental rights and the full legal value of the right to a good administration<sup>24</sup>.

Finally, in connection with the right to a good administration<sup>25</sup>, a number of essential principles of European administrative law can be recalled as they are better protected with a general codification. According to professor Wakefield, the right to a good administration does not relate to an individual principle of administrative law, but a combination of several principles of administrative law<sup>26</sup>. In the same vein, Advocate General Poiares Maduro affirmed in his opinion in *max.mobile*<sup>27</sup> that the Court generally requires the rights invoked in support of an action to be sufficiently 'precise' and, in particular, where the individual rights

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See Joanna Mendes, "Good Administration in EU Law and the European Code of Good Administrative Behaviour", 9 *European University Institute Law reports* (2009), at 11.

<sup>22</sup> Mendes, "Good Administration in EU...", at 13.

<sup>23</sup> Mir Puigpelat, "Razones para una codificación ...", at 150 and Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee. Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung*, Springer (Heidelberg, 2006), at 392.

<sup>24</sup> Mir Puigpelat, "Razones para una codificación ...", at 150, this author presents the eloquent example of access to documents. A right awarded by virtue of soft law instruments until Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, 1) turned this right into a fully enforceable right and thus brought about a significant change in the transparency of the European Institutions.

<sup>25</sup> Some authors argue for the consideration of this right to a good administration as a general principle more than a right, as it includes a range of rights. See in this vein, Eva Nieto Garrido, "Administración europea y derechos fundamentales: los derechos a una buena administración, de acceso a los documentos y a la protección de datos de carácter personal" in Eva Nieto Garrido and Isaac Martín Delgado, *Derecho administrativo europeo en el Tratado de Lisboa*, Marcial Pons (Madrid, 2010), 53-85, at 54; Javier Guillem Carrau, "El avance del derecho a la buena Administración en el Tratado de Lisboa", 19 *Revista de Derecho de la Unión Europea* (2010), 31-70, at 43; Loïc Azoulai "Le principe de bonne administration", in *Droit administratif européen*, Jacqueline Dutheil de la Rochère et Jacques-Bernard Auby (dirs.), Bruylant (Brussels, 2007), 493-518, at 493. However, the ChFR lists it as a right, which is not in contradiction with the fact that it can be broken down to a combination of more concrete individual rights. On the conception of Article 41 ChFR as a right more than a principle see also Klara Kanska, "Towards Administrative Human Rights in the EU-Impact of the Charter of Fundamental Rights", 10(3) *European Law Journal* (2004), 296-326.

<sup>26</sup> Jill Wakefield, *The right to good administration*, Kluwer (Alphen aan den Rijn, 2007), at 23.

<sup>27</sup> C-141/02 P, *Commission / max-mobil* [2005] ECR I-1286.

can be derived directly from provisions of the Treaty<sup>28</sup>. In other words, these rights are so broadly defined that they need a clear concretisation in secondary legislation<sup>29</sup>.

It is for this reason that the arguments of the commentators that advocate for the codification of administrative procedures are linked to these essential principles of administrative law, and which are best protected by specific clauses incorporated into a general act of administrative procedures. The main principles concerned are the following:

a) the principle of legal certainty; which can be better provided by general norms than by general principles by the case-law and regulations by different sectors<sup>30</sup>. The Regulation would establish the default procedures to fill gaps in existing law<sup>31</sup>. The codification would thus provide general rules for matters such as time-limits for deciding on proceedings, rules on impartiality of officers, position of interested third parties, rules on electronic communications, indication of appeals that may be lodged, and termination of proceedings by agreement<sup>32</sup>;

b) the principle of legitimacy; the enactment of a general Regulation on administrative procedures would bring about the participation of experts and stakeholders during the codification phase of the enactment of the Regulation<sup>33</sup>;

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<sup>28</sup> *Ibid.*, at paragraph 54.

<sup>29</sup> Herwig C.H. Hofmann and Bucura Mihaescu, "The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case", 9(1) *European Constitutional Law Review* (2013), 73-101, at 79.

<sup>30</sup> This is for Mir-Puigpelat the main argument for codification, *see* Mir-Puigpelat, "Razones para una codificación ...", at 151; and Christoph Vedder, "(Teil)Kodifikation des Verwaltungsverfahrenrechts der EG?", 1 *Europarecht* (1995), 75-94, at 89.

<sup>31</sup> Jacques Ziller, "Is a law of administrative procedure for the Union institutions necessary? Introductory remarks and prospects", Briefing Note European Parliament, DG for Internal Policies, (2010) available at [http://www.europarl.europa.eu/RegData/etudes/note/join/2011/432771/IPOL-JURI\\_NT%282011%29432771\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2011/432771/IPOL-JURI_NT%282011%29432771_EN.pdf), at 15

<sup>32</sup> "Arguments in favour of a general ...", Briefing Note, at 15.

<sup>33</sup> Professor Ziller (in Ziller, "Is a law of administrative procedure for the...", at 23) points out that in a process as ambitious as a codification of administrative procedures all the expertise could be gathered in particular with: a)

c) the principle of transparency; as codification would have a twofold effect. It would make the procedure easier to know by citizens and it would generalise the rights to know the reasoning of the Administration and other related to transparency<sup>34</sup>;

d) the principle of participation; considering administrative procedures as a bridge between the citizen and the public administration, general rules on participation will ensure that participation rules in all the areas and not only with a sector-specific approach<sup>35</sup>; and

e) the principle of legality; not only by filling gaps in the legal system, but also by facilitating a better judicial control of administrative action with common standards<sup>36</sup>.

There is an academic consensus emerging that the time has come to a codification of administrative procedures at the Union's level<sup>37</sup>, although there are some commentators that have expressed concerns of different nature<sup>38</sup>. Some ambivalence or reluctance, for example,

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practitioners coming from institutions, bodies, offices and agencies of the Union, but also from Member States' public administrations; b) judges; c) representatives of addressees of administrative decisions and other stakeholders in EU policies; d) the European Ombudsman; e) the European Data Protection Supervisor; f) academia; and g) the European Parliament and to a certain extent of National Parliaments.

<sup>34</sup> Martin Delgado, "Hacia una norma europea...", at 191. It must be noted that Article 298 TFEU, and its predecessor in the Constitutional Treaty, were proposed by the Swedish delegation with the aim, among others, to bring more transparency to the EU public administration.

<sup>35</sup> Martin Delgado, "Hacia una norma europea...", at 195, moreover, this idea would be reinforced by Article 11(1) TFEU, which reads: "The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action."

<sup>36</sup> Herwig C.H. Hofmann, Jens-Peter Schneider, and Jacques Ziller, "Administrative Procedures and the Implementation of EU Law and Policies", 2 *Law Working Paper Series of the University of Luxembourg* (2014), 1-29, at 4.

<sup>37</sup> Oriol Mir-Puigpelat, "La codificación del procedimiento administrativo en la Unión Administrativa Europea", in Jens-Peter Schneider, and Francisco Velasco Caballero, *La unión administrativa europea*, Marcial Pons (Madrid, 2008), 51-85, at 52; Craig, *EU Administrative Law...*, at 279; Clemens Ladenburger, "Evolution oder Kodifikation eines allgemeinen Verwaltungsrechts in der EU", in Hans-Heinrich Trute, Thomas Groß, Hans Christian Röhl, and Christoph Möllers, (coords.), *Allgemeines Verwaltungsrecht - zur Tragfähigkeit eines Konzepts*, Mohr Siebeck (Tübingen, 2008), 107-33, at 107

<sup>38</sup> For example, Carol Harlow, "European Administrative Procedure: the European Union as Exemplar", in Sabino Cassese et al., *Lisbon Meeting on Administrative procedure; Functions and Purposes of the Administrative Procedure: New Problems and New Solutions*, Institute for Legal and Political Sciences of the

to the idea of an EU-wide codification, stems from the different attitudes towards codification between legal traditions, in particular, between civil and common law countries<sup>39</sup>.

The academic debate on the sufficiency of the legal basis appears to reach the conclusion that the time is ripe for a codification<sup>40</sup>, thanks to Article 298 TFEU, the fundamental right to a good administration included in the Charter and the other principles and considerations analysed before. Codification would not harm the existence of special procedures, for which the general Act of administrative procedure would be applicable only in a subsidiary basis.

Another debate, much less developed so far, concerns more specifically composite procedures, namely, the scope of the codification to come, and whether the general code on administrative procedures should cover only purely EU administrative procedures or it should be extended to composite procedures too.

The previous considerations on the need and urgency of a codification of administrative procedures are particularly pertinent for composite procedures, where there is a more visible imperative for transparency, accountability, legal certainty, and clear judicial control. While it is in the context of procedures of direct administration that the previous arguments have been developed, the existence of comprehensive procedural rules for each case makes the need for a general code of administrative procedures less critical than for composite procedures. In composite procedures we have seen how the lack of procedural arrangements, let alone a basic legal framework in some cases, leads to situations where the procedural rights of individuals are not properly safeguarded. Therefore, from a substantive point of view, the general code of administrative procedures is more even necessary as concerns composite procedures than administrative procedures related to direct

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*Lisbon University Faculty of Law*, 37-52, available at [http://www.icjp.pt/sites/default/files/media/e-book\\_international\\_isbn.pdf](http://www.icjp.pt/sites/default/files/media/e-book_international_isbn.pdf)

<sup>39</sup> Carol Harlow and Richard Rawlings, "National administrative procedures in a European perspective: pathways to a slow convergence", 2 *Italian Journal of Public Law* (2010), 215-58, at 217.

<sup>40</sup> Mir Puigpelat, "Razones para una codificación ...", at 150.

implementation of Union policies. From a formal point of view, however, the possibility to include composite procedures in the scope of a future EU Regulation on administrative procedures is more complex and has to be elaborated with more detail.

#### *6.2.2.- The state of play of the process of codification*

The European Parliament has played the most prominent role as an Institution in pushing for the codification of administrative procedures. The Committee on Legal Affairs set up a working group on EU administrative law in July 2010. The two objectives of the Working Group were to establish the current state of EU administrative law and then to propose appropriate legislative action in the light of Article 298 TFEU. The group finished its work in October 2011, setting out its conclusions in a working paper<sup>41</sup>. The document expressed particular concern on the inadequacy of citizen's procedural rights *vis-à-vis* the EU's administration. The recommendation to the Committee of Legal Affairs was to request a legislative initiative for a general administrative law binding on the EU, which should provide "a minimum safety net of guarantees" for citizens.

Afterwards, in 2012 the European Parliament published the so-called European Value Added Assessment on the Law of Administrative Procedure of the European Union<sup>42</sup>. This study analysed the suitability of Article 298 TFEU as a legal basis for a future Regulation, and identified the main problems of the current state-of-affairs, notably the existing fragmentation and lacunae. The study concluded with a recommendation to enact such

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<sup>41</sup> The working group included Members of the European Parliament from the different political groups. It took on board contributions by many scholars and practitioners, either in written form, or as part of conferences and presentations, which included many of the authors cited throughout this work, such as Jean-Bernard Auby, Marta Ballesteros, Javier Barnes, Francesca Bignami, Sabino Cassese, Edoardo Chiti, Oriol Mir-Puigperlat, Eva Nieto, Jürgen Schwarze, Christoph Vedder, and Jacques Ziller. The working document can be consulted at [https://epnet.europarl.europa.eu/http://www.jurinet.ep.parl.union.eu/jurinet/webdav/site/jurinet/shared/JURI\\_doc/wk\\_groups/EU\\_Admin\\_Law/Working\\_document/2011.10.19\\_Working%20Document%20on%20EU%20Administrative%20Law.pdf](https://epnet.europarl.europa.eu/http://www.jurinet.ep.parl.union.eu/jurinet/webdav/site/jurinet/shared/JURI_doc/wk_groups/EU_Admin_Law/Working_document/2011.10.19_Working%20Document%20on%20EU%20Administrative%20Law.pdf)

<sup>42</sup> The European Value Added Assessment on the Law of Administrative Procedure of the European Union was published on 23 October 2012. The main contributors were professors Päivi Leino Sandberg, Jacques Ziller and the Blomeyer consortium. [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/dv/eav\\_lawofadminprocedure\\_/EAV\\_Law\\_ofAdminprocedure\\_EN.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/eav_lawofadminprocedure_/EAV_Law_ofAdminprocedure_EN.pdf)

Regulation, on the basis of many of the arguments advanced before in terms of openness, legal certainty, individual rights, but also efficiency of the public administration.

Drawing on the conclusions of the Working Group and the European Added Value Assessment, the committee of Legal Affairs drafted a legislative initiative report pursuant to Article 225 TFEU, whose rapporteur was Luigi Berlinguer. The plenary adopted it on 15 January 2013<sup>43</sup>. The European Parliament's call to the Commission to submit a legislative proposal was strongly motivated by legal arguments that a legal basis was available in Article 298 TFEU.

The initiative report contained six recommendations. The first relates to the objective and the scope of the regulation to be adopted. This first recommendation is critical for the purposes of our study because, besides setting that the guarantee of the right to good administration shall be the main objective of the Regulation, it establishes that it should only apply to the Union's institution, bodies, offices and agencies, that is, limited to direct implementation. The second recommendation is that the Regulation operates as a general code, so that the procedure is applicable in as much as no other sectorial rules apply but, at the same time, establishes a *de minimis* protection to individuals that cannot be undermined by sector-specific laws.

The third and fourth recommendations relate to the content of the future Regulation. The third recommendation indicates the principles that should be codified, notably, the principle of lawfulness, the principles of non-discrimination and equal treatment, the principle of proportionality, the principle of impartiality, the principle of consistency and legitimate expectations, the principle of respect for privacy, the principle of fairness, the principle of transparency, and the principle of efficiency and service. The fourth recommendation establishes some rules governing administrative decisions, notably, on the initiation of the administrative procedure (on the administration's own initiative or at the

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<sup>43</sup> European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)).



request of the interested party), the acknowledgement of receipt, the impartiality of administrative decisions, the right to be heard, the right to access one's file, the time-limits, the form and notification of the administrative decisions, which shall be in written and in the language chosen by the addressee, the duty to state reasons, and the indication of the remedies available.

Finally, the fifth recommendation concerns the review and correction of administrative decisions and the sixth recommendation regards the form and publicity to be given to the regulation.

The Commission initially welcomed the initiative of Parliament. The Vice-President of the Commission Mr Šefčovič stated during the debate in Parliament preceding the approval of the report in January 2013<sup>44</sup> that a comprehensive regulation on EU administrative procedures would have a lot of benefits in terms of citizens' rights and efficiency of the administration, but at the same time, he expressed the Commission's concerns that it would also bring about of lack of flexibility or adaptability over time, and oversimplification. For this reason, he argued that the Commission would analyse and weigh the possible advantages against the costs.

As time lapsed, the cautious approach of the Commission seems to have given way to inaction. During the hearings of the Commissioners-elect in 2014 on the occasion of the election of the new Commission, the questions asked by the Committee of Legal Affairs were not given a specific answer<sup>45</sup> and a legislative proposal has not yet been presented. There is no indication on the side of the Commission that the proposal will be forwarded any time soon, and considering its plead for fewer rules, one cannot be very optimistic that the codification will materialise in the short term.

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<sup>44</sup> See minutes of the debate of 14 January 2013 at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20130114+SIT+DOC+PDF+V0//EN&language=EN>

<sup>45</sup> For instance, the eighth written question to Vice-President elect Georgieva by the Committee of Legal Affairs, available at <http://www.elections2014.eu/en/new-commission/hearing/20140918HEA65210>

### *6.2.3.- The inclusion of composite procedures in the general Act on EU administrative procedures*

Throughout the debates in the Committee of Legal Affairs of the European Parliament, the limitation of the scope of the future Regulation to the procedures within the framework of direct administration was not put into question. The wording of the first recommendation of the legislative resolution remained unchanged since the first report proposed by the rapporteur and it was not subject to any amendment. The reason for this choice is to be found in a very cautious approach taken by the Parliament, in view of the reticence of the other Institutions that will need to play a role in the enactment of the act, that is, the Commission and the Council. It is an approach that accepts a certain interpretation of the legislative history of Article 298 TFEU, though not necessarily the most appropriate.

This interpretation is the following; it understands that this provision was incorporated to the Constitutional Treaty<sup>46</sup> with the intention of being addressed to the Union's administration only, and not that of Member States, as results from the documents of the European Convention (Working Group V)<sup>47</sup>. This newly inserted legal basis was not meant to interfere directly with the autonomy of national public administrations.

However, we largely explained that the old binary distinction between direct and indirect implementation is long outdated and composite procedures cannot be categorised as a form of indirect administration<sup>48</sup>. Certainly, the fact that composite procedures are not a category laid down in secondary legislation contributes to the confusion. It is, from this point of view, a mistake to imply that the hypothetical exclusion of indirect administration from the scope of Article 298 TFEU excludes any type of implementation of EU law that exceeds the traditional borders of direct administration.

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<sup>46</sup> Article III-304.

<sup>47</sup> CONV 375/1/02 REV 1 WG V 14 Report of Working Group V "Complementary Competencies", available at <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00375-re01.en02.pdf>

<sup>48</sup> In particular, sections 2.2.1, 2.2.3 and 2.7.

This confusion added to the doubts on whether composite procedures should be included in the codification. While some commentators point out that the codification of administrative procedures would be the most suitable occasion to lay down rules for the blurred relations between the national and the Union public administrations in the context of administrative procedures<sup>49</sup>, this possibility was seen as too far-reaching at the moment and the possibility to extend its scope outside the very limits of direct administration was ruled out by the European Parliament in its resolution communicated to the Commission. A classical conception of European administrative procedure still identifies that concept with the procedures for direct execution of EU law<sup>50</sup>.

It has been presented in the previous Chapter that general rules on composite procedures would not only be useful for the completeness of the regulation of EU administrative procedures, but indeed essential to guarantee the basic procedural rights to the individuals and a comprehensive system of judicial protection. The question must then be addressed on whether or not the Union would have a competence for specific rules on composite procedures and whether or not Article 298 TFEU would also serve as an appropriate legal basis for these rules.

Although the initiative report left aside this question and limited its scope to direct implementation, the preparatory work during the works of the Committee of Legal Affairs addressed this issue. The European Value Added Assessment on the Law of Administrative

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<sup>49</sup> Pablo García-Manzano Jiménez de Andrade, "Codificación Administrativa Europea: Formas de ejecución conjunta del Derecho de la Unión Europea e Interconexión de Reguladores", in José Eugenio Soriano García (dri.), *Procedimiento Administrativo Europeo*, Civitas (Madrid, 2012), 529-54, at 535; and Javier Barnés Vázquez, "Sobre el procedimiento administrativo: evolución y perspectivas", in Javier Barnés Vázquez (coord.), *Innovación y reforma en el derecho administrativo*, Global Law Press (Sevilla, 2006), 263-341, at 264.

<sup>50</sup> Eugenio Picozza, "Il regime giuridico del procedimento amministrativo comunitario", in *Rivista Italiana di Diritto Pubblico Comunitario* (1994), 321-48, at 324.

Procedure of the European Union<sup>51</sup> contains a section in which it analyses the impact on composite procedures<sup>52</sup>. It rightly argues that:

"A regulation establishing an EU Law on Administrative Procedure on the basis of Article 298 TFEU would not change the situation regarding the public authorities in Member States, who would still be bound only by the relevant subject-specific or sector-specific directives and regulations and by the boundaries set up by the ECJ's case law on 'procedural autonomy'. The principle of subsidiarity would therefore be fully complied with."

The Regulation would still be directly binding to the EU public administration only, but this is not incompatible with its application to composite procedures. The Regulation would set a number of minimal procedural guarantees to be applied by the EU authorities in their part of the procedure, while national authorities would still abide by their own national administrative and procedural provisions.

The fact that the Regulation would not be binding in its entirety on the national authorities does not entail that it would be irrelevant for them. On the one hand, national courts might refer through a preliminary ruling procedure to the Court of Justice so as to know whether or not the procedural guarantees had previously been complied with by EU authorities, and eventually annul the final national decision if this is not the case. This system would solve the most relevant shortcoming identified within the category of downwards composite procedures. On the other hand, Member States authorities are bound the respect of fundamental rights contained in the Charter when they are implementing EU law<sup>53</sup>, but 'only'

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<sup>51</sup> See reference in footnote 42.

<sup>52</sup> Section 3.2 at page II-50.

<sup>53</sup> However, the Court of Justice had argued long before that when national authorities act as delegated authorities of the Community, they are bound by the general principles of European law, for example in Case 230/78 *Eridania - Zuccherifici nazionali* [1979] ECR 2749, at paragraph 31 and Joined Cases 201 and 202/85 *Klensch / Secretary of State* [1986] ECR 3477, at paragraphs 6-10. Later the Court of Justice said more specifically that a national measure implementing EU law must observe EU standards as regards fundamental rights, in Case C-2/92 *Bostock* [1994] ECR I-955. See further Xavier Groussot, Laurent Pech, and Gunnar Thor

then, pursuant to Article 51(1) ChFR<sup>54</sup>. Certainly, Member States are implementing EU law when acting in the context of composite procedures, so it can be expected that the rules and guarantees of the Regulation of EU administrative procedures are configured as a basic content and standard of the fundamental rights enshrined in Article 41 ChFR.

This later aspect would require further explanation as Article 41(1) ChFR limits its institutional scope of the right to good administration under to 'institutions, bodies, offices and agencies of the Union'. This means that, for this provision in particular, the threshold of institutional scope is set below the general limitation of Article 51(1) ChFR<sup>55</sup>. Despite this apparently clear limitation, the Court of Justice has accepted that Member States authorities may be bound in certain circumstances by some obligations deriving from the principles of good administration when implementing EU law<sup>56</sup>. More specifically, Advocate General Kokott spoke with clarity on "the principle of good administration to which the Member States must also have regard when applying Community law"<sup>57</sup>.

Moreover, the case law of the Court of Justice has nuanced the limitation of the scope of application of Article 41 ChFR in its recent ruling in *Mukarabega*<sup>58</sup>. While it acknowledged that "it is clear from the wording of Article 41 of the Charter that it is

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Petursson, "The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication", 1 *Eric Stein Working Papers* (2011), 1-36, at 4 and 5.

<sup>54</sup> The scope of Article 51(1) at the national level remains unclear, and the Court of Justice has found itself in difficulties to provide clear-cut limits, *see* Allan Rosas. "When is the EU Charter of Fundamental Rights Applicable at National Level?", 19(4) *Jurisprudence* (2012), 1269–1288. Many situations remain unclear, for example, where the Court of Justice has accepted to interpret a Union norm in a purely national situation if national law makes a reference to this norm in Case C-482/2010 *Cicala*, ECR [2011] I-14139, at paragraph 19. The conditions, still relatively unclear, to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter are laid down in Case C-40/11 *Iida* [2012] ECR, paragraph 79; Case C-87/12 *Ymeraga and Others* [2013] ECR, paragraph 41; and Case C-206/13, *Siragusa / Regione Sicilia* [2014] (ECLI:EU:C:2013:291).

<sup>55</sup> Hofmann and Mihaescu, "The Relation between the Charter's ...", at 96.

<sup>56</sup> *Ibid.* at 97, in particular in Case C-428/05 *Laub / Hauptzollamt Hamburg-Jonas* [2007] ECR I-5069, at paragraph 25, the Court of Justice argued that the principle of good administration "precludes a public administration (also a national administration) from penalising an economic operator acting in good faith for non-compliance with the procedural rules, when this non-compliance arises from the behaviour of the administration itself".

<sup>57</sup> Case C-392/08 *Commission / Spain* [2010] ECR I-2537, at paragraph 16.

<sup>58</sup> Case C-166/13, *Sophie Mukarubega / Préfet de police*, [2013] (ECLI:EU:C:2014:2336).

addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union"<sup>59</sup>, it also stated that Article 41 ChFR contained fundamental rights, such as the right to be heard, which were inherent to general principles of EU law<sup>60</sup>. These general principles are, at its turn, applicable to Member States when the authorities of the Member States take measures which come within the scope of EU law<sup>61</sup>.

The inclusion of composite procedures in the general rules on administrative procedures for the Union would not be contrary to the principle of procedural autonomy of Member States. The principle of procedural autonomy, as often emphasised by the Court of Justice<sup>62</sup>, entails that "it is for the domestic legal system to determine the procedural conditions governing actions intended to ensure the protection of rights which citizens have from the direct effect of Community law."<sup>63</sup> It is to be noted, however, that this principle of procedural autonomy is recognised by the case law of the Court of Justice inasmuch as it can co-exist with the principles and requirements governing relations between national and EU law<sup>64</sup>. Thus, it is established since *Rewe*<sup>65</sup> that the application of the national procedural law is subsidiary to explicit European law. Furthermore, the Court of Justice later elaborated that Member States are also bound by the principles of equivalence and effectiveness arising from the obligation of sincere cooperation<sup>66</sup>. This approach has even been applied even in cases where Member States are not obliged to implement EU law<sup>67</sup>.

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<sup>59</sup> *Ibid.* at paragraph 44.

<sup>60</sup> *Ibid.* at paragraphs 45-48.

<sup>61</sup> Case C-383/13, *G. and R.*, [2013] (ECLI:EU:C:2013:533), at paragraph 35.

<sup>62</sup> Henry G. Schermers and Denis F. Waelbroeck, *Judicial Protection in the European Union*, Kluwer Law, (The Hague, 2001), at 199.

<sup>63</sup> Case C-33/76, *Rewe-Zentralfinanz* [1976] ECR 1989, at paragraph 5.

<sup>64</sup> Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, Springer (Heidelberg, 2009), at 8.

<sup>65</sup> C-33/76, *Rewe-Zentralfinanz*

<sup>66</sup> Under Article 4(3) TEU. See Case C-261/95 *Palmisani* [1997] ECR I-4025, at paragraph 27; and Case C-453/99 *Courage* [2001] ECR I-6297, at paragraph 29).

<sup>67</sup> Case C-105/03 *Pupino* [2005], ECR I-5285, at paragraphs 39-42.

Consequently, there would be no objection from the point of view of procedural autonomy to a certain regulation of composite procedures, which would not impose a complete procedural system for the national authorities participating in composite procedures, but would ensure certain guarantees and mechanisms of cooperation to ensure the coherence of the procedure and the respect for right of the individuals concerned by such procedures. Member States would still be bound, on substance, by the relevant subject-specific or sector-specific rules, and act according to their procedural rules, except for a number of basic procedural guarantees<sup>68</sup>. This logic is in line with the proposal by the ReNEUAL<sup>69</sup>, which acknowledges that Member State authorities will apply national rules of administrative procedure, but that these rules must comply with the EU general principles of law and fundamental rights<sup>70</sup>.

Article 298 TFEU should be the appropriate legal basis for the rules on composite procedures too. There are confronted views on the scope of Article 298 TFEU. Since it is a provision introduced by the Treaty of Lisbon and it has not been used as a legal basis, there is so far no judicial interpretation of its scope. The narrow interpretation of Article 298 would posit that this legal base shall be to the regulation of the internal procedures of EU institutions, bodies, offices and agencies. There are however several reasons why this interpretation must be discarded.

A narrow view on Article 298 TFEU would entail that the provision itself is irrelevant and redundant. If Article 298 TFEU was restricted to an exclusively internal dimension of the EU institutions and bodies, it would not add anything to the previously existing Article 336

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<sup>68</sup> The European Value Added Assessment on the Law of Administrative Procedure of the European Union cited before, at page II-50.

<sup>69</sup> The Research Network on EU administrative law, ReNEUAL, elaborated the draft model rules on EU administrative procedures (available at <http://www.reneual.eu/>) which will be commented on afterwards.

<sup>70</sup> In particular, Article III-24 of the draft model rules published by the network of scholars reads that: " In a case of composite procedure, where an EU authority makes the decision it must comply with the procedural requirements in Article III-23. Where the decision is made by a Member State authority it must comply with the requirements of Article III-23 where sector-specific legislation renders the procedural rules in Book III applicable. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings."



TFEU<sup>71</sup>. Furthermore, as professor Craig argues, many reforms in the institutional accountability and efficiency were adopted in the past, notably after the resignation of the Santer Commission, without any need for Article 298 TFEU which did not exist at the time<sup>72</sup>. Such interpretation of Article 298 TFEU would also be contrary to the intention of the drafters of the provision, because it results clearly from the work of the Convention on that provision that the writers intended to introduce a Treaty provision power for the Union to adopt new, more far-reaching rules on good administration<sup>73</sup>.

An extensive interpretation is indeed supported by the legislative history of the precedent of Article 298 TFEU, *i.e.* Article III-398 of the Constitutional Treaty. This provision originated in a proposal of the Swedish Government. In view of the preparatory works of the Convention, it can be concluded that there were two dimensions of the provision: one internal, focused on the increase of the efficiency of the EU administration, and one external focused on the procedural rights of citizens<sup>74</sup>. This second dimension was particularly emphasised during the preparatory works, where it was stated that the provision would cover "basic principles for good administration of the work of the EU institutions. These could include inter alia service obligations, means to safeguard objectivity and impartiality, increased openness, procedures for consultation, etc." and would "indicate a specific legal base to adopt EU rules to this effect", pointing out that this could affect Member States procedures when implementing EU law<sup>75</sup>.

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<sup>71</sup> Legal basis for the staff regulations, former Article 283 TEC.

<sup>72</sup> Paul Craig, "A General Law on Administrative Procedure, Legislative Competence and Judicial Competence," 19 *European Public Law* (2013), 503-24, at 511. Also, Herwig C.H. Hofmann, Jens-Peter Schneider, and Jacques Ziller, "Administrative Procedures and the Implementation of EU Law and Policies. Contribution by the Research Network on EU Administrative Law (ReNEUAL) project on administrative procedure to the EU Commission's 'Assises de la Justice' conference in Brussels 21-22 November 2013 to the topic of EU administrative law", *University of Luxembourg Law Working Paper Series Paper number 2014-02*, (2014), 1-29, at 12.

<sup>73</sup> Working Group V "Complementary Competencies", Working document 30 REV 1 Revised draft report, available at <http://european-convention.europa.eu/docs/wd5/4044.pdf>.

<sup>74</sup> Paul Craig, "A General Law on Administrative Procedure...", at 505.

<sup>75</sup> Working group V « Complementary Competencies », Working Document 13, (Subject : Note by Mrs Hjelm-Wallen on "Good administration, efficiency and openness"). Available at <http://european-convention.europa.eu/docs/wd5/1931.pdf>, at 3.

A final argument, pointed out by professor Craig, looks carefully at the wording of Article 298(1) TFEU and concludes that it is not irrelevant that after reference to the 'institutions, bodies, offices and agencies of the Union', as if it were an exhaustive list, it says that 'shall have the support of a ... European administration', reflecting the fact that the European administration goes beyond the elements of institutions, bodies, offices and agencies of the Union, which could constitute strictly speaking the administration of the EU<sup>76</sup>. The distinction, as formalistic as it might seem, has indeed large consequences. The analysis of the delimitation of both concepts was developed in the second chapter of this study<sup>77</sup>. At this point, suffice it to state that this reference to the support of a European administration brings about a wider concept of executive power with the potential to include national public administrations in charge of the implementation of EU law, as happens in the context of indirect implementation but also, more intensely, in the context of composite procedures. In this sense, the EU public administration would be core, but not the whole of the large executive power of the Union, which would have several shared elements with Member States. The European Administration comprises then both the Union's administration and the Member States administration when implementing EU law, in the context of indirect administration but also in that of composite procedures.

The idea that the European Union can stipulate a norm of administrative procedure that applies to EU institutions as well as national agencies is not revolutionary<sup>78</sup>. There are several examples of sector specific EU acts which detail rules of administrative procedure applicable to national agencies or other authorities, including procedural rights of individuals.

The framework directive on the telecommunications sector<sup>79</sup> imposes certain obligations on the Member States concerning the independence of the national regulatory

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<sup>76</sup> Craig, "A General Law on Administrative Procedure...", at 512.

<sup>77</sup> Section 2.6.2.

<sup>78</sup> Craig, "A General Law on Administrative Procedure...", at 505.

<sup>79</sup> Directive of the European Parliament and of the Council 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002, L108, 33-50).

agencies<sup>80</sup>, and award certain rights to the private parties concerned, such as the right to consultation and certain guarantees of transparency<sup>81</sup>. The directive on integrated pollution prevention and control<sup>82</sup> is another good example, as it establishes detailed guarantees in view of the right of access to justice to individuals<sup>83</sup>. It also imposes obligations to amend national procedural laws and strengthen participation rights<sup>84</sup>.

Another illuminating example can be found in Regulation 1049/2001<sup>85</sup> on public access to documents which relates to a citizens' right *vis-à-vis* the public administration. Regulation 1049/2001 is applicable to the European institutions only and was adopted on the legal basis of Article 255<sup>86</sup> TEC which established the right to access the documents of the Commission, the Council and Parliament. This legal basis could not possibly cover any enlargement of this right to the access of documents in the national administrations. However, the Regulation contains a provision on the interplay of documents originating from the EU institutions but held by Member States authorities. Thus, it provides that where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision. This provision is an eloquent example of an obligation created for Member States, in full respect of their

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<sup>80</sup> *Ibid.* at Article 3.

<sup>81</sup> *Ibid.* at Article 6.

<sup>82</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (consolidated version) (OJ 2008 L 24, 8-29).

<sup>83</sup> *Ibid.* at Article 16.

<sup>84</sup> As amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, 26-32).

<sup>85</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 145 L 2001, 43-48).

<sup>86</sup> "1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."

administrative procedural autonomy, in order to ensure the effectiveness of a right conferred at the EU level on the basis of a provision, Article 255 of the old TEC, with a much narrower scope than Article 298 TFEU.

It can be concluded from the previous considerations that Article 298 TFEU, read together with Article 41 ChFR, provides a sufficient legal basis for a general codification of EU administrative procedures. Such codification can and should include composite procedures, despite the doubts and precautions that the Institutions have shown so far. However, unlike administrative procedures within the framework of direct administration, the rules should not address all the details of the regulation of composite procedures as far as the national level of administration is concerned, but only impose the minimum obligations to Member States to ensure the coherence of the regulation of composite procedures and the comprehensiveness of the rights recognised to citizens in that regard.

#### *6.2.4.- A proposal for the provisions on composite procedures in the General Act of EU administrative procedures*

Following the considerations laid down in the previous section, composite procedures should be included in the regulation codifying EU administrative procedures but not in the same fashion as administrative procedures in the context of direct implementation of EU law, where only the EU level of public administration is concerned. The approach is that the EU regulation should concern primarily the Union's public administration. The national authorities should abide by their national laws and operate according to national procedures, but the EU regulation could include certain mechanisms of coordination and, notably, ensure certain individual rights that could not be otherwise guaranteed.

In view of comparative law, this approach is not unseen. In both Spain and Italy, the general law of administrative procedure establishing the general provisions applicable of administrative procedures at the central level at the same time that it establishes certain

obligations and minimum standards applicable to all the levels of government<sup>87</sup>. The Spanish legislation is particularly interesting in this regard. The Act 30/1992<sup>88</sup>, establishes certain provisions that must be respected by all the public authorities under its scope, which includes the administrations of the regions or *Comunidades Autónomas*. There can be sector-specific rules, both at the central level and regional level, that detail some procedural arrangements applicable to some administrative procedures. However, this general law does not preclude the existence of regional laws on administrative procedures, even with a general nature and in view of their peculiar administrative organisation, as long as the minimum standards set at the national level are respected<sup>89</sup>.

The approach proposed would not be identical to this national laws but would bear the resemblance that, although primarily addressed at the central level of administration, certain elements can be applicable to decentralised levels of administrations too. According to this proposal, the few obligations imposed onto Member State authorities would be limited to the framework of composite procedures and would only establish the minimum safeguards for those individual rights that, as examined in the previous Chapter, cannot be sufficiently enforced without an EU Regulation.

Following this approach, the EU regulation should contain the following provisions.

### 1.- A definition of composite procedures

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<sup>87</sup> Ziller, "Is a law of administrative procedure for the...", at 11.

<sup>88</sup> Ley 30/1992, of 26 November, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law of the legal regime of the public administration and of the common administrative procedure), published in the BOE 285 of 27 November 1992.

<sup>89</sup> There are numerous regional laws on administrative procedures with a general character, such as the Law 3/2003 of 26 of March, of the Balearic Islands (BOE 98 of 24 April 2003), or the Law 2/1995 of 13 March, of the Principality of Asturias (BOE 106 of 4 May 1995). This system is based on Article 149.1.18 of the Spanish Constitution which awards the central State the legislation on the general administrative procedure but without prejudice to the competences of the Autonomous Communities stemming from their internal organisation and other competences, as interpreted by the ruling of the Spanish Constitutional Court 227/1988, of 29 November.

Any reference to the concept of composite procedures in the other provisions would need a definition of composite procedures in the first place. Apart from the legal certainty that this definition would bring about, it would have the merit of bringing a point of reference for other sector-specific regulations and, perhaps more importantly, to the Union's courts. From the moment that there is a definition of composite procedures, a coherent and comprehensive approach to the legal concerns related to composite procedures could be expected from the Court of Justice.

The definition should be in line with the suggestion explained in Chapter 4<sup>90</sup>, *i. e.* administrative procedures involving the participation of both national and EU public administrations aiming at the implementation of EU law. In light of our previous explanations, composite procedures are sequences of procedural steps in which administrative bodies from the national administration and the European Union provide with a contribution to the final decision at either level. The core element of the notion is that intense cooperation between national and European authorities is reflected in a procedural arrangement with different degrees of formalism. The definition in the law could go along the lines: "Composite procedures are administrative procedures in which administrative authorities from the Union and from Member States cooperate and provide a relevant input to the final decision taken at the EU level or at the national level for the purpose of implementing EU law."

The provisions concerning composite procedures should be applicable to both top-down and bottom-up composite procedures. This would not mean that the EU Regulation would be equally applicable to them. In bottom-up composite procedures, where the final decision is taken by the EU public administration, the EU Regulation on administrative procedures, or the sector-specific Regulation, would be applicable for most of the procedure except for the part of the sequence where national administrations intervene, in which national rules are applicable but also the minimum safeguards described below. By contrast, in top-down composite procedures, much of the administrative procedure will be governed by

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<sup>90</sup> Section 4.2.1.

national administrative rules, while the participation of the Union's administration will be provided for in the EU Regulation, together with these minimum guarantees which national authorities should respect.

## 2.- The protection of the right to be heard in composite procedures

It was analysed at length in the previous Chapter that the right to be heard was an essential procedural right that was not always fully respected in the context of composite procedures. The analysis of the case-law in the previous Chapter concluded that the right to be heard in composite procedures was treated by the EU courts differently in different sectors<sup>91</sup>.

In areas like the repayment of custom duties, the case law corrected the deficiencies of the legislation. In this sector, rules were amended to eliminate the aspects to which the judges had been critical<sup>92</sup>. In some other areas, like the procedure for the authorisation of pesticides, the procedural arrangements established are satisfactory from the point of view of respect for the right to be heard<sup>93</sup>. In other fields, like the management of structural funds, the approach of the Union's courts raised a number of concerns. Our analysis revealed the urgency for a general, comprehensive approach to the problems of composite procedures.

The solution that we advanced as a conclusion to our analysis was that the right to be heard had to be respected at every stage at which a binding decision, even if not final, was taken. Consequently, in the procedural schemes where one level of administration makes a recommendation of such legal nature that can later be contradicted by the other level of

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<sup>91</sup> See section 5.2.

<sup>92</sup> In this vein, Article 906 a of Commission Regulation (EEC) No 2454/93 of 2 July 1993 (OJ 1993 L 253, 1) laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, 1).

<sup>93</sup> See section 4.4.2. and Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, 1-47).



administration, a hearing does not need be repeated. The right to be heard can work effectively when it takes place before the final decision is made, provided that the concerned party has full information on the previous recommendation and is given the possibility to refute the conclusion of such recommendation.

The incorporation of this scheme to the general Regulation on administrative procedures would lead to a rule that mandates the right for the concerned person to submit observations to the authority having the competence to make a discretionary binding decision. This right shall be awarded on several occasions if the stages of the procedure so require.

In the case of bottom-up composite procedures, the right to be heard must be granted at the national level when the input from the national authorities is binding. Thus, the individual must be able to comment on the decision taken at the national level and then later, eventually, at the EU level at the moment when the final decision is taken.

The right to be heard would then be governed by national procedural legislation, and not by the content of the EU Regulation on administrative procedures. However, such national rules would have to comply with EU general principles of law concerning fair hearings. As previously explained, this requirement would be unproblematic from the perspective of respect of national procedural autonomy.

The principle of procedural autonomy entails that, unless the procedural issues are directly regulated in the EU law, the Member States remain autonomous and can legislate on procedural issues inasmuch as this possibility has not been pre-empted by the European Union<sup>94</sup>. The principle is both conditional and limited. Conditional because it depends on the lack of exercise of competences, as the Court of Justice established as early as in the

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<sup>94</sup> Vincent Couronne, "L'autonomie procédurale des États Membres de l'Union européenne à l'épreuve du temps" 46 (3-4) *Cahiers de droit européen* (2010), 273-309, at 276.

*Simmenthal* ruling<sup>95</sup>, and limited because Member States have to adopt solutions in alignment with the principles of effectiveness and of equivalence<sup>96</sup>.

The principle of effectiveness, in particular, intends to prevent the situation in which the national procedural rules would render the enforcement of EU law based rights impossible or excessively difficult. In those cases, the Court of Justice asks the national courts to go beyond simple equivalence and to make a particular type of procedure or remedy available. The most classic statement of these requirements can be found in the *Rewe* case when the Court of Justice argued that “[...] in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law”. This statement was further reiterated in many other rulings<sup>97</sup>, and entails, for the purposes of our analysis, that a rule compelling Member States to respects certain minimum procedural standards in the context of their input to composite procedures would not violate their procedural autonomy.

This approach would indeed entail the imposition of an obligation on Member States. This means that when participating in composite procedures they would be obliged to grant this right to be heard even if their internal procedural rules do not foresee such right. This would happen, for example, as the case has proven relevant, when national administrative law does not consider the decision to be made by the national authorities as final. This would also be justified in the understanding that national administration acts in composite procedures as

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<sup>95</sup> Case 106/77 *Simmenthal* [1978] ECR 629

<sup>96</sup> Michal Bobek, "Why There is no Principle of 'Procedural Autonomy' of the Member States", in Bruno de Witte and Hans Micklitz, *The European Court of Justice and Autonomy of the Member States*, Intersentia (Antwerp, 2011), 305-22, at 305; and Krystyna Kowalik-Bańczyk, "Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings", 5(6) *Yearbook of Antitrust and Regulatory Studies* (2012), 215-35, at 220.

<sup>97</sup> Case C-128/93, *Fisscher / Voorhuis Hengelo BV* [1994] ECR I-4583, at paragraph 39; Case C-410/92, *Johnson* [1994] ECR I-5483, at paragraph 21; Case C-394/93, *Alonso-Pérez / Bundesanstalt für Arbeit* [1995] ECR I-4101, para. 28; Case C-246/96, *Magorrian and Cunningham* [1997] ECR I-7153, at paragraph 37;; Joined Cases C-52/99 and C-53/99, *Camarotto and others* [2001] ECR I-1395, at paragraph 21; Case C-432/05, *Unibet* [2007] ECR I-2271, at paragraph 39; and Case C- 40/08, *Asturcom Telecomunicaciones SL / Cristina Rodríguez Nogueira*, ECR 2009 I-09579, at paragraph 41.

part of a wider European administration and Article 298 TFEU would thus be a sufficient legal basis.

In the case of top-down composite procedures, the obligation should be imposed on the Union public administration to grant this right to be heard before the input by the EU is forwarded to the national authorities. The imposition of this obligation would be unproblematic, as it only concerns the Union's authorities.

In both cases, the further safeguard should be that the statement of the individual shall be included in the file so the authority that makes the final decision takes into consideration all the information available to it. This conclusion is in line with the proposal of the ReNEUAL. In the draft model rules on EU administrative procedures presented in 2014, Article III-24 proposes the rules on the right to be heard in composite procedures, and it specifies that the right shall be respected at all stages of a composite procedure, at national and European level<sup>98</sup>.

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<sup>98</sup> The Draft model rules were presented in the ReNEUAL conference of 19 May 2014, for which documentation is available at [www.reneual.eu](http://www.reneual.eu).

Book III - Single case decision making. Article III-24:

Right to be heard in composite procedures

"(1) The right to be heard must be respected at all stages of a composite procedure between the EU and the Member States leading to a decision in the manner set out in this Article. The application of the right to be heard will depend on the division of responsibility in the decision-making process.

(2) In a case of composite procedure, where an EU authority makes the decision it must comply with the procedural requirements in Article III-23. Where the decision is made by a Member State authority it must comply with the requirements of Article III-23 where sector specific legislation renders the procedural rules in Book III applicable. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings.

(3) In a case of composite procedure, the form and content of the hearing provided pursuant to Article III-23 (5) by the public authority that makes the decision will be affected by the extent to which the rights of the defence were adequately protected at a prior stage in the administrative proceedings by another public authority.

(4) In a case of composite procedure, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles in Article III-23 (3)-(5). Where sector specific legislation renders Book III applicable to Member States, the preceding obligation applies mutatis mutandis where a Member State authority makes the recommendation. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings.

(5) In a case of composite procedure, where the EU authority's decision is predicated on a recommendation made by another public authority and where there was no opportunity for a hearing before such a public

### 3. The obligation to state reasons

The obligation to state the reason for a certain administrative decision is closely linked to the right to be heard as well as to the right to judicial review. It means that the public authority must inform the individual concerned of the reasons of a decision against his interest, so he can eventually refute the those grounds and facts in an eventual application to review the decision.

The proposal of a provision in the Regulation for EU administrative procedures would follow the same rationale as seen in the previous section, meaning that the statement of reasons must be provided for every step in which a discretionary decision is taken. For each decision in the administrative sequence, even if not final, motivation shall be made known to the interested party. In this case, however, it does not harm the position of the individual if the obligation is not complied with at every step, but only at the end, in which case the reasons included in the final decision should relate to the previous steps of the procedure.

The aim of this right is to contest the administrative decision at a judicial instance. Hence, the statement of reasons is linked to the final decision, even if it concerns previous decisions too, because only the final decision can be challenged. The essential element is thus that the individual has full knowledge of the whole information not only on the final decision, but also on the previous decisions that might have been determining for the outcome of the procedure.

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authority, the right to be heard before the decision is taken shall include knowledge of the recommendation and the ability to contest its findings. Where sector specific legislation renders Book III applicable to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the decision pursuant to a recommendation made by another public authority. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings.

(6) For the avoidance of doubt, this Article is also applicable to cases of composite procedure where EU law imposes legal obligations on Member State authorities to coordinate or co-operate action that leads to individual decisions."

The case law of the EU courts has accepted the statement of reasons *per relationem*, meaning by reference to documents or information, as long as the information referred is complete<sup>99</sup>. This statement of reason would remain possible provided that it is indeed complete and does not harm the rights of the individual in view of a possible challenge of the administrative decision. This means that if the statement of reasons concerning a part of the procedure is not communicated together with the final decision, but was made known before, it would suffice that the latter makes reference to it.

A final element is that national administrations should be bound to respect the standards of the Union in its obligation to state reasons. This element would not be problematic, given that Member States are implementing EU law and policies in the context of composite procedures and thus the requirement of Article 51(1) ChFR in relation to Article 41 ChFR would be fully complied with.

Consequently, the provision should read that in the context of composite procedures the public administration shall state the reasons in a clear, simple and understandable way of its decision in each step of the administrative sequence. This statement of reasons can refer to a previous administrative decision as long as the concerned party is in a position to fully ascertain the reason of the administration for its final decision. This proposal would also be in line with Article III-29 of the draft Rules of ReNEUAL.

#### 4. Overcoming the shortcomings for the right to judicial review

The analysis of the shortcomings regarding access to justice took up the most important part of the previous chapter as these are indeed the most relevant legal challenge

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<sup>99</sup> Case T-182/96 *Partex / Commission* [1999] ECR II-2673, at paragraph 76; Case T-72/97 *Proderec / Commission* [1998] ECR II-2847, at paragraph 105; T-80/00 *Associação Comercial de Aveiro / Commission* [2002] ECR II-2465, at paragraph 42.

that composite procedures bring about. We structured the study of access to justice in three parts: the determination of the competent court, the definition of challengeable act, and the legal standing of individuals. Such structure is also useful for the solutions that will be advocated in this chapter.

The allocation of competences to review acts in the context of composite procedures was the first problem identified. The paradigmatic case of *Borelli*<sup>100</sup> proves that there are cases where composite procedures lead to a legal dead-end. Neither national courts are competent to review because the act in question is not final nor the EU courts can rule on the act challenged because the act in question emanates from a national administration. The general Regulation on EU administrative procedure should determine the competences clearly in the context of composite procedures. This specification is not necessary for administrative acts of the Union in general in the case of direct implementation, because they will be under the competence of the EU courts. For national administrative acts, even in the context of indirect implementation of EU law, the problem does not arise either, because they fall under the competence of national courts. In composite procedures, as we have seen, there is room for uncertainty.

The determination of the competent court shall be linked to the origin of the challenged act. This is uncontroversial. EU courts will review the acts emanating from the Union, thus normally in the context of what we have called upwards composite procedures, and the national courts will be competent for decisions taken by national authorities, namely resulting from downwards composite procedures. Nevertheless, two concerns arise; the first is that the definition of what a challengeable act is not necessarily clear and homogeneous, the second is the extent to which the competent court can extend its competence.

The first problem would be relatively easy to tackle. It would require a definition of challengeable act. This definition should be included in the General Act of EU administrative

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<sup>100</sup> Case C-97/91, *Oleificio Borelli / Commission*, [1992] ECR I-6313.

procedures with a general character<sup>101</sup>, that is, not restricted to composite procedures. On substance, this would not be revolutionary as the Court of Justice has already established that concept which is not substantially different from the one existing in national legislations. The case-law of the Court of Justice has long established that challengeable acts include "only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position."<sup>102</sup> The non-formalistic approach to the notion of challengeable act found in the traditional case-law of the Court of Justice has to be nuanced in view of the partially formalistic approach after the Lisbon Treaty which results from the *Inuit* rulings<sup>103</sup>. In any case, and taking into consideration the recent evolution of the case law, this notion refers to the decision affecting the legal position of the individual, and thus refers primarily, save for exceptional cases, to the final decision of an administrative procedure and with the exclusion of preparatory acts.

Even if not revolutionary, laying down a definition of challengeable act would be a positive development and would help to clarify the competence of EU courts and national courts, leaving aside preparatory acts which will generally not be susceptible of a challenge in court. As it will be developed subsequently, the solution to the shortcoming that preparatory acts cannot be reviewed independently shall relate to a mechanism of cooperation and communication between courts that enables for a preliminary review or interpretation of preparatory decisions when pertinent.

So, leaving aside the aspects which could be tackled in a relatively easy fashion by following the existing case law on the matter, the legal true conundrum of the extension of the judicial competence stems from the fact that in composite procedures more than one administration has taken part in the administrative procedure, but the competent court, either

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<sup>101</sup> The European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)) includes in part 4 some rules governing administrative decisions. The definition of challengeable act should be included in this section.

<sup>102</sup> Case 60/81 *IBM / Commission* [1981] ECR 2639, at paragraph 48; Case C-117/91 *Bosman / Commission* [1991] ECR I-4837, at paragraph 13; and T-3/93 *Air France / Commission* [1994] ECR II-121, at paragraph 43.

<sup>103</sup> Case T-18/10, *Inuit Tapiriit Kanatami / Parliament*, [2011]II-5599 and T-262/10, *Microban International and Microban (Europe) / Commission* [2011] ECR II-7697, as confirmed by the Court of Justice in Case C-583/11 P *Inuit Tapiriit Kanatami and Others / Parliament and Council* [2013] (ECLI:EU:C:2013:625).



national or European, can only review the actions of one level of administration. This problem could be confronted by three possible alternatives:

The first alternative would be that the competent Court on the final act is competent to review the whole of the administrative procedure. In bottom-up administrative procedure, this alternative would entail that the Union courts would be competent to interpret national law and rule on the validity of national administrative acts. In top-down administrative procedures, it would mean that national courts can rule on the validity of administrative acts by the administration of the EU. This alternative would imply, in formal terms, the modification of primary law and, in substance, a radical overhaul of the conception of the judicial system of the Union. EU courts would be given jurisdiction over national law and national courts would be competent to rule on the decisions of the Commission and other EU Institutions and bodies, so this alternative must be discarded.

The second alternative would be to allow each court to rule on the validity of each and every step of the administrative sequence regardless of whether it constitutes a merely preparatory act. This alternative is relatively realistic, and it can be deduced of the *Borelli* case law, inasmuch as the Court of Justice mandated that the preparatory acts were reviewed by national courts even if that runs counter their own administrative rules. However, this is not a satisfactory solution. It entails a denaturalisation of administrative procedures and appears contrary to both the national and the EU conception of administrative procedure as a series of steps towards a final decision that can be reviewed. It would, furthermore, create legal uncertainty for the individual in terms of the acts that he would be able to challenge and the deadlines for them. This confusion would probably worsen the position of the individual in practice. Considering many of the cases that have been examined the extent to which the binding effect of preparatory acts is unclear, this possibility would give way to potential conflicts of jurisdiction between the Union and national courts, a situation that cannot be welcomed. This alternative would thus bring about more problems than it would solve.

The third alternative is to use mechanisms of cooperation between the two systems of courts. Such mechanism would entail that if the validity of an act adopted in the course of the administrative procedure is at stake, the Court with the competence to review the final administrative decision can refer its question of validity to the court competent to rule on the validity of the administrative acts at stake. A distinction must be made between downwards and upwards composite procedures as for the viability of this proposal.

Top-down composite procedures are relatively less problematic. In this type of composite procedures, national courts would have the opportunity to ask the Court of Justice through a preliminary ruling procedure. This mechanism would in theory be suitable to avoid any shortcomings in the guarantee of the right to judicial review for downwards procedures, in spite of the inherent limitations of preliminary rulings procedures, such as the longer resolution time for such judicial procedures, the fact that the procedure is not obligatory for national courts when there is a right to further recourse, and the possibility that the national courts do not raise the preliminary ruling procedure at all. However, these are limitations common to the preliminary ruling procedure in general<sup>104</sup>.

The problems in the mechanism in the peculiar context of composite procedures stem from the interpretation of the Court of Justice of the need for binding effects. The conclusion of the analysis of the case law on downwards composite procedures was that sometimes the appreciation of the Court of Justice in contributions by the EU administrative authorities to an administrative procedure were not binding and as such the final decision of the national authorities was fully discretionary<sup>105</sup>. In some of the situations analysed, this line of reasoning was open to criticism and led to unfavourable situations for the individuals. It can be expected, however, that a clear definition of composite procedures would encourage the Union's courts to look at the phenomenon more consistently, taking into consideration composite procedures as a whole and thus correct this approach.

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<sup>104</sup> More details on the limitations and criticisms to the preliminary ruling procedure are included in the following section 6.3.1.

<sup>105</sup> A notable case in this vein was Case 109/83, *Eurico / Commission*, [1983] ECR 3582, but there are others analysed in section 5.3.5.

The mechanism of cooperation between courts does not exist in the context of bottom-up composite procedures, which are indeed the most frequent type of composite procedure. The Courts of the Union have neither the power to rule on the validity of the procedural steps taken by national authorities nor the possibility to question national courts about it. This is arguably the main gap in judicial protection that the individual faces in the context of composite procedures. It is a challenge for which the only viable solution is the establishment of a new cooperation mechanism between the Courts of the Union and the Courts of Member States, which we will call inverse preliminary ruling procedure and which need to be explained in detail in a separate section.

This third alternative would furthermore be coherent with the rationale of cooperation existing at the administrative level and would mirror such cooperation, *mutatis mutandis*, at the level of the judicial systems. It would match the increasingly mixed character of the administrative structures of the European Union<sup>106</sup>, and would help to ease the tension between EU and national courts by establishing a new mechanism of communication.

### ***6.3.- Inverse preliminary ruling procedure***

#### *6.3.1.- The preliminary ruling procedure and its functions*

The establishment of the preliminary reference procedure in the original Treaties was not only a revolutionary instrument unprecedented in International Law<sup>107</sup> but the main path thanks to which the rulings of the Court of Justice constitutionalized the Community system of law<sup>108</sup>. The Court itself said that preliminary ruling procedure is "the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the

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<sup>106</sup> Gráinne de Búrca, "The Constitutional Challenge of New Governance in the European Union", 28 *European Law Review* (2003), 814-39, at 814.

<sup>107</sup> Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice*, Oxford University Press (Oxford, 2010), at 5.

<sup>108</sup> Gráinne de Búrca and Joseph H. H. Weiler (eds.), *The European Court of Justice*, Oxford University Press, (Oxford, 2001), at 7.

law established by the Treaties retains its Community character with a view to guaranteeing that the law has the same effect in all circumstances in all the Member States of the European Union"<sup>109</sup>.

The involvement of the Court of Justice in the litigation at national level regarding the interpretation of European Union law was of capital importance in the development of a community of Law, a milestone to which not only the Court of Justice but also the national courts, by their readiness to submit the relevant questions and to comply with the rulings, contributed<sup>110</sup>.

The preliminary ruling procedure has become a central instrument for judicial control in the Union and for ensuring the effective application of EU law<sup>111</sup>. Its main characteristic is that it is based on co-operative rather than hierarchical model of control<sup>112</sup>. This element explains many peculiarities in the legal protection in the European Union<sup>113</sup>. As professor von

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<sup>109</sup> Report of the Court of Justice on certain aspects of the application of the Treaty of the European Union (1995), at 5.

<sup>110</sup> Joseph H. H. Weiler, *The Constitution of Europe 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, Cambridge University Press (Cambridge, 1999), at 32. As professor Schermers eloquently put it: "Much of the credit for the Community legal order rightly goes to the Court of Justice of the European Communities, but the Court will be the first to recognize that they do not deserve all the credit. Without the loyal support of the national judiciaries, preliminary questions would not have been asked nor preliminary rulings followed. And the national judiciaries themselves would not have entered into Community law had not national advocates pleaded it before them. For the establishment and growth of the Community legal order it was essential for the whole legal profession to become acquainted with the new system and its requirements. Company lawyers, solicitors and advocates had to be made aware of the opportunities offered to them by the Community legal system." See Henry Schermers, "Special Foreward," 27 *Common Market Law Review*, (1990), 637-38, at 637. Some authors add, that the mechanism enables national judges to participate in the development of EU law, for example, Robert Kovar, "La contribution de la Cour de justice à l'édification de l'ordre juridique communautaire", in *Collected Courses of the Academy of European Law IV (1)*, Kluwer Law (The Hague, 1993), 15-122.

<sup>111</sup> Broberg and Fenger, *Preliminary References...*, at 2.

<sup>112</sup> Armin von Bogdandy, "Founding Principles", in Armin von Bogdandy, and Jürgen Bast (eds), *Principles of European Constitutional Law*, Hart Publishing (Oxford, 2009), 11-54, at 33.

<sup>113</sup> Renaud Dehousse, *The European Court of Justice: the politics of judicial integration*, Macmillan (London, 1998), at 14.

Bogdandy has argued "European legal unity is not perceived as centralistic, but as pluralistic and dialogical"<sup>114</sup>, which reflects a certain federal logic of the Union<sup>115</sup>.

There are certainly different types of academic criticism against the preliminary ruling procedure as it is currently conceived, though the system has proven difficult to reform<sup>116</sup>. The lengthening of judicial procedures when a preliminary question is raised is among the most evident drawbacks of the system<sup>117</sup>, but laconic or inconclusive rulings have also been criticised<sup>118</sup>. From a more theoretical perspective, a debatable aspect is the possibility that courts which are not of last instance are empowered to launch the procedure. Some scholars have posited the limitation to the highest courts to reinforce the mutual trust between courts and avoid some inefficiencies of the system<sup>119</sup>. Indeed, the possibility exists that lower courts seek in raising a preliminary ruling to a different case-law of that established by higher national courts. This possibility can indeed result in a higher standard of protection of individual rights, as it has happened notably in certain areas recently<sup>120</sup>.

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<sup>114</sup> von Bogdandy, "Founding Principles...", at 33. Against this opinion, the thesis that the Court of Justice is increasingly reasoning in terms of superiority (more popular in the UK), see Monika Kirilova Kirova, "An Analysis of the Relationship between National Courts and the Court of Justice of the European Union – Shifting from Cooperation to Superiority", 2(1) *Queen's Political Review* (2014), 93-105; and Peter Wattel, "Köbler, CILFIT and Welthgrove: We Can't Go on Meeting Like This" 41(1) *Common Market Law Review* (2004), 177-90.

<sup>115</sup> von Bogdandy, "Founding Principles...", at 33.

<sup>116</sup> Takis Tridimas, "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure", 40(6) *Common Market Law Review* (2003), 9-50, at 46-47

<sup>117</sup> The average duration of a preliminary ruling procedure was 15 months in 2014, see the Report 2014 of the Court of Justice available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-03/cp150027en.pdf>

<sup>118</sup> Michael Bobek, "Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice", 45(6) *Common Market Law Review* (2008), 1611-1643, at 1641.

<sup>119</sup> Jan Komarek, "In the court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure", 32(4) *European Law Review* (2007), 467-91, argues that limiting the power of lower courts to make preliminary references is more coherent with national judicial hierarchy as an important element of the Union judicial process, which can make the preliminary ruling procedure rational and effective while keeping its original purpose.

<sup>120</sup> An example of such situation are the different cases in which the Spanish mortgage legislation, or a certain interpretation thereof, has been declared incompatible with EU consumer protection rules, such as in cases Case C-415/11, *Mohamed Aziz / CatalunyaCaixa* [2013] ECLI:EU:C:2013:164; C-169/14, *Sánchez Morcillo and Abril García* [2014] (ECLI:EU:C:2014:2099); and Joined Cases C-482/13, C-483/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco and Caixabank* [2015] (ECLI:EU:C:2015:21); see further Juana Marco Molina, "Spanish Law in 2010–2012: The influence of European Union law and the impact of the economic crisis", 6 *Journal of Civil Law Studies* (2013), 426-34.

On the opposite direction, some criticism is addressed to the efficacy of the obligation to raise a preliminary ruling procedure, which sometimes national courts do not respect, and the limitations of the *CILFIT* case-law<sup>121</sup>. The so-called *acte clair* doctrine<sup>122</sup> -the matter is so obvious as to leave no space for any reasonable doubt-, complemented with the *acte éclairé* doctrine<sup>123</sup> -the matter has already been settled by the Court of Justice in another analogous case-, entails that national courts, even of last instance have a reasonable leeway to ponder whether the preliminary ruling procedure shall be initiated<sup>124</sup>. Abuse could take place if the national court argues that the interpretation of EU law is clear<sup>125</sup>. Although a breach in the obligation to raise a preliminary reference can be sanctioned under EU law, and the individual can ultimately be awarded his right<sup>126</sup>, this relative discretion of the national courts can result in limitations of rights of the individuals. In the most serious cases, non-referral for a preliminary ruling can constitute an infringement of the right to a fair trial<sup>127</sup>. This is indeed the main shortcoming that we identified in the context of downwards composite procedures,

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<sup>121</sup> C-283/81, *CILFIT / Ministero della Sanità* [1982] ECR I-3428.

<sup>122</sup> *Ibid.* at paragraph 16: "The correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the court of justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it."

<sup>123</sup> First established in the Joined Cases 28-30/62 *Da Costa / Nederlandse Belastingadministratie* [1963] ECR 38, where the Court of Justice said "Although the third paragraph of Article 177 of the Treaty on the European Economic Community unreservedly requires courts or tribunals of a members state against whose decisions there is no judicial remedy under national law to refer to the court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."

<sup>124</sup> This flexible approach to the margin of discretion of national courts has been confirmed by recent rulings such as Case C-260/07, *Pedro IV Servicios* [2009] ECR I-2437, at paragraph 31; and Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus* [2011] ECR 2011, at paragraph 32.

<sup>125</sup> Albertina Albors-Llorens, "Judicial Protection before the Court of Justice of the European Union", in Catherine Barnard, and Steve Peers (eds.), *European Union Law*, Oxford University Press, (Oxford, 2014), 255-99, at 291, for a reasoned report on the extensive use of the *Acte clair* doctrine by national courts see Morten Broberg, "Acte Clair Revisited: Adapting the Acte Clair Criteria to the Demands of the Times", 45(5) *Common Market Law Review* (2008), 1383-97, specially at 1396.

<sup>126</sup> The Court of Justice established state liability for judicial breaches of European community law precisely for failure to raise a preliminary ruling procedure in C-224/01, *Gerhard Köbler / Österreich* [2003] ECR I-10239,

<sup>127</sup> Regina Valutyte. "State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights", 19(1) *Jurisprudence* (2012), 7-20, at 10; and Opinion of Advocate General Léger in Case C-224/01, *Gerhard Köbler / Österreich* [2003] ECR I-10239, at paragraph 147.

where national courts were competent but needed to raise a preliminary ruling procedure to fully ascertain the validity of the final national administrative decision.

Despite these reservations, the preliminary ruling procedure has proven to be a successful and efficient instrument in many respects<sup>128</sup>. It is a common place in the academia to stress the central role of the preliminary ruling procedure in the establishment of the most fundamental principles of EU law<sup>129</sup>, in the creation of a community of law -a *jus comunae europeo*-<sup>130</sup>, and thus in the advancement of European integration<sup>131</sup>. Other procedures for which the Court of Justice is competent would not have provided the Court with the opportunity develop such relevant case-law on the foundations of EU law<sup>132</sup>. The uniformity in the interpretation of EU law, and the very essential questions that the Court of Justice settles through preliminary references, are the reason why the possibility to transfer preliminary cases to the General Court foreseen in Article 256 TFEU has never been used, and it is not likely to be used even in specialised areas of EU law<sup>133</sup>.

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<sup>128</sup> A piece of evidence of the success of the preliminary ruling procedure as it is perceived by the legal community, as AG Jacobs pointed out, is that similar systems are being proposed for other international courts, like the European Court of Human Rights, and the International Court of Justice, *see* Francis G. Jacobs, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice", 38 *Texas International Law Journal* (2003), 547-56, at 550.

<sup>129</sup> Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice Hardcover*, Oxford University Press (Oxford, 2010), at 2.

<sup>130</sup> Takis Tridimas, "Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure", 40(1) *Common Market Law Review* (2003), 9-50, at 36

<sup>131</sup> Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration", 47(1) *International Organization* (1993), 41-76, at 58; Koen Lenaerts, José Antonio Gutiérrez Fons, "El papel del Tribunal de Justicia de la Unión Europea en el proceso de integración europea", en José María Beneyto Pérez, Jerónimo Maillo González-Orús, and Belén Becerril Atienza, *Tratado de derecho y políticas de la Unión Europea Vol. 5 - Sistema jurisdiccional de la UE*, Aranzadi (Cizur Mayor, 2009), 33-112; , and Jean-Yves Pitarakis and George Tridimas, "Joint Dynamics of Legal and Economic Integration in the European Union", 16 *European Journal of Law and Economics*, (2003), 357-68, at 358.

<sup>132</sup> Anthony Arnall, *The European Union and its Court of Justice*, Oxford University Press (Oxford, 2006), at 97.

<sup>133</sup> Broberg and Fenger, *Preliminary References...*, at 25. Against the reluctance of the Court of Justice *see* for example, Josef Azizi, " Opportunities and Limits for the Transfer of Preliminary Reference Proceedings to the Court of first Instance", in Ingolf Pernice, Juliane Kokott, and Cheryl Saunders (eds.), *The future of the European judicial system in a comparative perspective*, Nomos (Baden-Baden, 2006), 241-56, at 251.



Besides its functions in the uniform interpretation of EU law and the elaboration of the general principles of EU law, one of the biggest virtues of the preliminary ruling procedure is that it has allowed the Court of Justice to intervene in controversies where individual rights were at stake<sup>134</sup>, and has sometimes taken the opportunity to enforce those rights in the context of restrictive national legal provisions<sup>135</sup>. The Court of Justice precisely highlighted the function of the preliminary ruling procedure as an essential element for the completeness of the Union's system of judicial protection in its famous *UPA* ruling<sup>136</sup>, therefore establishing the protection of individual rights as an essential function of the preliminary ruling procedure. As some commentators have stressed, the Court of Justice has taken the opportunity to build its legitimacy and authority on this direct relationship it holds with European citizens when dealing with this preliminary ruling procedures<sup>137</sup>. This function of the preliminary ruling procedure was already examined in the previous chapter<sup>138</sup>.

Indeed, this logic responds to the need for a mechanism of dialogue between the national and the Union's judges in order to ensure the protection of individual rights, a logic which is essential for the solution that will be advanced afterwards.

### 6.3.2.- *The judicial dialogue in the EU*

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<sup>134</sup> Anthony Arnall, *The European Union ...* at 98.

<sup>135</sup> This is notoriously the case of the Spanish legislation on mortgage enforcement procedures, which contained rigorous rules to the detriment of the debtor and which the Spanish courts applied in its integrity until a series of rulings of the Court of Justice substantially amended the system in favour of debtors. See Javier Gómez Gállego, "La doctrina del Tribunal de Justicia de la Unión Europea sobre calificación de las cláusulas abusivas en los préstamos hipotecarios", 741 *Revista Crítica de Derecho Inmobiliario* (2014), 153-75; Marco Molina, "Spanish Law in 2010–2012...", and cases cited in footnote 120.

<sup>136</sup> Case C-50/00 P *Unión de Pequeños Agricultores / Council* [2002] ECR I-6677. Before the *UPA* ruling, AG Jacobs explained the function of preliminary ruling procedure in the context of the protection of individual rights in Francis Jacobs, "Enforcing Community Rights and Obligations in National Courts: Striking the Balance", in Julian Lonbay and Andrea Biondi (eds.), *Remedies for Breach of EC Law*, Wiley & Sons (Chichester, 1997), 25-36.

<sup>137</sup> Damian Chalmers, "Judicial preferences and the Community legal order", 60(2) *Modern Law Review* (1997), 164–99, at 197.

<sup>138</sup> Section 5.3.4.

In the famous ruling of the case *Cohn-Bendit*<sup>139</sup>, the French *Conseil d'État* stated that "at the level of the European Community, there should be no government of judges or war of judges but rather there must be room for a dialogue of judges"<sup>140</sup>. Needless to say, the preliminary ruling procedure appears as the most important formal mechanism for such dialogue.

This understanding of the role of the Court of Justice in the context of the preliminary ruling procedure by a highly reputed national authority does not aim at demeaning the role and the authority of the Court of Justice. Far from it, the Court of Justice had already emphasised, in rulings as early as *Costa / ENEL*<sup>141</sup> and *Simmenthal II*<sup>142</sup>, the importance of the network of courts established by the preliminary ruling in holding both national and European actors accountable<sup>143</sup>. The relationship between the Courts should thus not be hierarchical, inasmuch as national law could not require the exhaustion of national remedies prior to a request for a preliminary ruling, but dialogical where a national judge is also a Community judge and the supremacy of Community law does not imply the inferiority of national courts<sup>144</sup>. The preliminary ruling procedure is described by professor Arnall as a source of mutual learning of practices and underlying principles<sup>145</sup>. Advocate General Jacobs said on this topic that :

"judicial dialogue is a vital feature of the ECJ because of the unusual character of its jurisdiction. In contrast to the U.S. Supreme Court, and perhaps to supreme courts generally, the ECJ is not essentially an appellate court. (...) it has jurisdiction to rule on many, although not all, questions of Union law referred to it by the "national

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<sup>139</sup> Decision of 22 December 1978 *ministre de l'intérieur c/ Cohn-Bendit*, Rec. Lebon at 524.

<sup>140</sup> The translation is ours.

<sup>141</sup> Case 6/64, *Costa / ENEL*, [1964] ECR 585.

<sup>142</sup> Case 106/77, *Amministrazione delle Finanze / Simmenthal*, [1977] ECR 630.

<sup>143</sup> Herwig C. H. Hofmann, "Composite decision making procedures in EU administrative law", in Herwig C. H. Hofmann and Alexander H. Türk (eds.), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, Edward Elgar Publishing (Cheltenham , 2009), 136-67, at 158.

<sup>144</sup> *Ibid.*

<sup>145</sup> Anthony Arnall, "The Law Lords and the European Union: Swimming with the Incoming Tide", 35(1) *European Law Review* (2010), 57-87, at 62.

courts” —i.e., the courts of the Member States, where a national court considers, in a case it is hearing, that a decision on the question is necessary to enable it to give judgment. Under this procedure— by which any court or tribunal of a Member State may, and a final court must, refer such a question to the ECJ for a “preliminary ruling” before it gives judgment —there is a sharing of jurisdiction between the national court and the ECJ which entails a special form of “judicial dialogue.”<sup>146</sup>

The existence and the fluidity of this judicial dialogue have indeed been essential for the construction of a cooperative spirit in the application and development of EU by national courts, as many commentators admit<sup>147</sup>. This logic is even embedded in the structure of the Court, comprised of judges and advocates general coming from each Member State, as well as in the administrative organisation of the Court, with a research department that can provide information on the national laws of the Member States<sup>148</sup>.

In the context of this judicial dialogue, the preliminary ruling procedure leads to a unidirectional pattern of communication between judges. In formal terms, this scheme only permits national courts to ask and the Court of Justice to reply. The reality, of course, is more complex and nuanced, and national courts do play an active role in the system<sup>149</sup>. The best illustration of national courts modelling the case-law of the Court of Justice and developing new important general principles is that of German courts and the necessary respect for fundamental rights<sup>150</sup>. German courts saw possible contradiction between EC law and national law provisions on fundamental rights, and asked for the guidance of the Court of Justice. Without any explicit basis in the Treaties at the time, the Court of Justice acknowledged that fundamental rights were enshrined in the general principles of

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<sup>146</sup> Francis G. Jacobs, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice", 38 *Texas International Law Journal* (2003), 547-56, at 548.

<sup>147</sup> Naïké Lepoutre, "Le renvoi préjudiciel et l'instauration d'un dialogue des juges Le cas de la Cour de justice de l'Union européenne et du juge administratif français", 6 *Jusdoctoria* (2011), 43-74, and 48; and Koen Lenaerts, "Le dialogue des juges, Actes du colloque organisé le 28 avril 2006 à l'Université libre de Bruxelles", 9 *Les Cahiers de l'Institut d'études sur la Justice Bruylant* (2007), 121-30, at 122.

<sup>148</sup> Jacobs, "Judicial dialogue...", at 549.

<sup>149</sup> . Weiler, *The Constitution of Europe ...*, at 32

<sup>150</sup> Jacobs, "Judicial dialogue...", at 549.

Community law and protected by the Court<sup>151</sup>. The *Bundesverfassungsgerichtshof* would go further and make its recognition of the supremacy of European Union's law conditional on the respect of fundamental rights<sup>152</sup>, which the Court of Justice accepted<sup>153</sup>.

That being said, preliminary ruling procedure remains structurally an unilateral mechanism of communication, which mirrors the original model of indirect administration of executive federalism, which, as long discussed in the second chapter, has now come far from reality<sup>154</sup>.

Oddly enough, among the different proposals stemming from the academia on the reform or the improvement of the preliminary ruling procedure -many of which focus on the enhancement of the functions of the national courts and the increase of the mutual trust<sup>155</sup>-, there is no emphasis on transforming the mechanism from a unilateral pattern of communication to a bilateral one. While there is a call for an enhanced cooperation between European and national courts<sup>156</sup>, the possibility proposed has not been thoroughly explored. The idea of an inverse preliminary ruling procedure or a incident review of the legality of action by a national court at request of the Court of Justice is not new. Professor Herwig Hofmann proposed it as mechanism to adapt judicial review to multi-level integrated procedures<sup>157</sup>.

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<sup>151</sup> Case 29/69, *Stauder / Ulm* [1969] ECR 419.

<sup>152</sup> Judgment of 29 May 1974, 37 BVerfGE 271. This case is generally known by EU scholars as *Solange I*.

<sup>153</sup> C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

<sup>154</sup> Section 2.2.3.

<sup>155</sup> Broberg and Fenger, *Preliminary References ...*, at 23 ff.; Komarek, "In the court(s) we trust?", at 470 ff.; and Kirilova Kirova, "An Analysis of the Relationship ...", at 104.

<sup>156</sup> Deidre M. Curtin, "European Legal Integration: Paradise lost?", in Deidre M. Curtin (ed.), *European Integration and Law*, Intersentia (Antwerp, 2006), 1-54 at 42; stresses the relevance of accountability networks which do not exist yet and in particular, networks of courts.

<sup>157</sup> Hofmann, "Composite decision making procedures...", at 159.

### *6.3.3.- A concrete proposal on the inverse preliminary ruling procedure*

Procedures for which the Court of Justice is competent are provided for in primary Law<sup>158</sup>. The proposed inverse preliminary ruling would be an incident procedure and would not constitute strictly speaking a judicial procedure of the Court of Justice, so it would not need to be provided for in the body of the Treaties. The inverse preliminary ruling would constitute a procedure for the national court and an incident for the EU courts, for this reason there are two types of instruments in which the inverse preliminary ruling procedure could be laid down.

From the perspective of the EU courts, the incident should be provided for in the Statute of the Court of Justice. Pursuant to Article 281 TFEU, the Statute may be amended in accordance with the ordinary legislative procedure, with the special element that the legislative procedure can be initiated at the request of the Court of Justice after consultation of the Commission, or on proposal from the Commission after consultation of the Court of Justice. It must be noted that major reforms of the EU courts<sup>159</sup>, with larger implications than the one we are proposing, are being dealt with through this procedure equivalent to an ordinary secondary legislation legislative procedure.

After the introduction of a provision with this possibility in the Statute of the Court of Justice, possibly by the addition of an Article in Title III 'the procedure before the Court of Justice of the Statute, the detailed provisions would have to be added to the Rules of Procedure of the Court of Justice and to the Rules of Procedure of the General Court<sup>160</sup>. This

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<sup>158</sup> Articles 258 to 281 TFEU.

<sup>159</sup> On 28 March 2011, the Court of Justice submitted a legislative initiative (Document 8787/11) under the second paragraph of Article 281 TFEU to amend the Protocol on the Statute of the Court of Justice, which included, inter alia, an increase of the number of judges at the General Court. The initiative led to doubling of the number of judges in the General Court from 2019. Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 341, 24.12.2015, p. 14–17).

<sup>160</sup> The amendment of the Rules of Procedure of the Court of Justice is competence of the Court of Justice, with the approval of the Council, pursuant to Article 253(6) TFEU; whereas the amendment of the Rules of procedure of the General Court is competence of the General Court with the agreement of the Court of Justice and the approval of the Council, pursuant to Article 254(5) TFEU.

could be done by the addition of a new chapter in Title IV 'Direct Actions' of the Rules of Procedure of the Court of Justice<sup>161</sup> and in Title III 'Direct Actions' of the Rules of Procedure of the General Court<sup>162</sup>. The establishment of this incident would be more pertinent in the context of actions for which the GC is competent, because they are initiated by private applicants. However, it should be included regarding actions brought before the Court of Justice too. Although the General Court would be the ordinary court for controversies emanating from composite procedures, as they are normally brought by private applicants, it cannot be excluded that a decision taken in the context of a composite procedure is later object of interinstitutional litigation or of an action brought by a Member State.

From the perspective of the national courts, the implementation of this procedure would be more complex. There would need to be an instrument of secondary law establishing that national laws implement such a system. A directive would thus need to be adopted making a reference to composite procedures as defined and regulated in the EU Regulation on administrative procedures as described in the previous section. The directive should establish the contact points of each Member State to which the requests should be addressed. These points of contact shall be competent to liaise national judicial bodies. A system of points of contact already exists in the field of judicial cooperation<sup>163</sup>. These contact points could either answer the request directly or forward it to the competent national court according to internal national rules. All Member States would need to incorporate the necessary procedural arrangements in their national legislations to implement this incident procedure.

It is thus for national legislation to determine the competent body that would ultimately reply the question. This would depend on the judicial structure in each country. As

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<sup>161</sup> Rules of Procedure of the Court of Justice of 25 September 2012 (OJ 2012 L 265), as amended on 18 June 2013 (OJ 2013 L 173).

<sup>162</sup> Rules of Procedure of the General Court of 1 July 2015 (OJ 2015 L 105).

<sup>163</sup> For example in Article 2 of Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network (98/428/JHA) ( OJ 1998 L 191, 4-7) and Article 2 of Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ 2008 L 348, 130–134).

examined in the previous Chapter<sup>164</sup>, the system of review of acts of the public administration goes from the ordinary courts in the United Kingdom to the review by a specialised body of the Administration in France, passing through the existence of a special jurisdiction in Spain. Only each national law can regulate the attribution of specific competences, because this will be intimately linked to the national court structure and procedural rules.

That said, some aspects, like the need to hear the parties, or a maximum deadline to forward the reply, can still be included in the directive in question. These procedural warranties are necessary so that the new system does not bring down the barriers to the individual rights of review at the expense of a breach in the right to a judicial process within a reasonable time. In order to safeguard the rights of the parties, it should be ensured that their points of view can be heard in the court replying the request, either orally or in written. The procedure should not last so long that the system is counterproductive for the rights of the individuals.

Although the procedure mirrors the preliminary ruling procedure, it is important to underline that its aim is restricted to the reply of the very question raised by the EU judges. Unlike the preliminary ruling procedure it does not aim at the homogeneous interpretation of the law. For that reason, the allocation of the competence to decide to a lower national court would be possible.

That way, the system would be similar to the system which exists in some national procedural legislations whereby a court can refer a preliminary question on the interpretation of a certain decision for which it is not competent to the competent court, so as to decide on the final decision at stake. This is notably the case in France, where following the separation of the purely 'judicial jurisdiction' from the 'administrative jurisdiction'<sup>165</sup>, *i. e.* that of the

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<sup>164</sup> See section 5.3.2.

<sup>165</sup> By the Law of 16-24 August 1790 on the separation of the administrative and judicial authorities, notably Article 13.



*Conseil d'État*, the French *Tribunal des Conflits* determined in his famous ruling *Septfonds*<sup>166</sup> that a civil court cannot interpret an administrative decision, and if it needs such interpretation to rule on the action for which it is competent, it must raise a preliminary ruling procedure before the administrative jurisdiction. Although this case-law has been nuanced since then, so that only in case of difficult interpretations must the question be raised, the mechanism of *renvoi* between the civil and the administrative jurisdiction still exists in France<sup>167</sup>. In Spain, for example, these questions between courts can be raised even within the administrative jurisdiction itself. According to the law on the administrative jurisdiction<sup>168</sup>, an administrative court competent to review a certain administrative decision may raise a question on the validity of an administrative regulation of general application, to the competent court.

Finally, this instrument could also be applied to relations between Member State administrative authorities. We identified fewer horizontal composite procedures than vertical composite procedures<sup>169</sup>, however the shortcomings in the right of judicial review are equally problematic. The system would allow national courts when reviewing an administrative decision by the public administration of their respective Member State to ask another national court to assess the validity of another administrative decision, therefore not leaving any room for a gap in legal protection.

An indirect effect of the establishment of this incident, though not an irrelevant one, would be to introduce a factor of trust between the national courts. It was indicated in the previous section how recent rulings of the Court of Justice and the reaction of some national courts had been interpreted by some authors as a sign of increasing mistrust to the Court of Justice due to the perception that it placed itself in a position of superiority in the context of the judicial dialogue that was supposed to take place among EU and national courts, therefore

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<sup>166</sup> Ruling of 16 June 1923, *Septfonds*, of the Tribunal de Conflits, *Récueil Lebon* n° 00732.

<sup>167</sup> See Jean-Claude Ricci, *Droit Administratif Général*, Hachette (Paris, 2013), at 261. In particular, the ruling of the Tribunal des Conflits of 17 October 2011, *SCEA du Chéneau c/INAPORC*, *Récueil Lebon* n°3828/3829.

<sup>168</sup> Article 27(1) of the Law 29/1998 of 13 July on the contentious-administrative jurisdiction (BOE 14 July 1998).

<sup>169</sup> See in the previous Chapter, section 5.3.5.

accusing the Court of Justice of a certain unilateralism<sup>170</sup>. The establishment of this incident and thus the transformation of the one way communication mechanism into a bidirectional mechanism would help to overcome this criticism.

#### **6.4.- Conclusions**

The interest of this study lies not only on the identification of the legal concerns of composite procedures, but on the outline of the solutions to those problems. The intention is that the ideas put forward are both plausible and complete. The rule making process in the European Union often reveals that these two characteristics, plausibility and completeness, seldom go hand by hand. In case of contradiction, as it can easily be understood, the first characteristic prevails over the second. Rightly so. The European Union is a political entity, one with numerous restrictions, not an academic entity.

However, the attempt made by this dissertation would not be satisfactory if it does not provide a sufficient answer to each and every shortcoming that has been identified in the previous chapters. This proposal is complete inasmuch as it provides a reasonable response to the three main challenges that composite procedures bring about.

A general law on EU administrative procedure, the milestone for the codification of administrative procedures in the European Union, is not a new idea. Scholars have been advocating for the adoption of such a Regulation for decades already. The Treaty of Lisbon provides a clear, sufficient legal basis. The European Parliament has launched the idea formally through a legislative resolution. Yet the Commission has not given a follow-up. A Commission committed politically to less law-making<sup>171</sup>, and the general political

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<sup>170</sup> Mel Kenny, "Options between Legislative Intervention and Judicial Collaboration: Improving the Effectiveness and Coherence of EU law?" 63(4) *Northern Ireland Legal Quarterly* (2012), 435-448, at 438; Wattel, "Köbler, CILFIT and Welthgrove...", at 178; and Kirilova Kirova, "An Analysis of the Relationship ...", at 103.

<sup>171</sup> See as an examples, Press Release of 18 October 2014 of the newly elected Commission available at [http://europa.eu/rapid/press-release\\_IP-14-1116\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1116_en.htm)

atmosphere existing at this moment do not provide a very positive context for a very far-fetched piece of legislation.

The resolution of Parliament limits itself to EU administrative procedures in the context of direct action of the EU. This is an insufficient approach. Rules on composite procedures are as necessary as rules on purely Union's administrative procedures, if not more; and there are no obstacles from the point of view of the legal basis or the respect for procedural autonomy of Member States to define composite procedures and establish minimum safeguards for the private parties concerned by them.

The mere definition of composite procedures included in the general act on EU administrative procedures would be an enormous step to correct the deficiencies of composite procedures, if only so that the EU courts had in mind that there is a separate category – 'composite procedures' – when deciding on a dispute in the context of these shortcomings.

The proposals in the context of the procedural rights of the individuals throughout a composite procedure are relatively modest and have been elaborated by the Court of Justice, at least in some of the cases analysed. They imply that the right to be heard must be respected whenever an administrative authority takes a binding discretionary decision. For the obligation to state reasons, they require that the individual is fully aware of the motivation of the final decision, including the previous administrative steps if relevant. The proposals are modest and realistic. In conclusion, they do not go further than the general scope of these procedural guarantees, only they are adapted to the peculiarities of composite procedures. Reliance on the general understanding of these rights has proven insufficient for a standard of protection of the individual comparable to the ones that the individual enjoys in other administrative procedures.

In terms of the deficiencies in the access to justice in composite procedures, it is not possible to provide a satisfactory solution only with provisions inserted in a Regulation on

EU administrative procedures. In particular, for bottom-up composite procedures the solution would not be complete without the establishment of a new channel of communication between the Court of Justice and the national courts. The *Borelli* conundrum cannot be solved otherwise, unless an invasion by the Court of Justice of the national jurisdiction is foreseen.

The proposal of an inverse preliminary ruling procedure is not as far-fetched as it might at first sight appear. It mirrors the preliminary ruling procedure but with a more humble, pragmatic effect, and without the pretension of uniformity of interpretation linked to preliminary ruling procedures. Something analogous exists in some Member States as a solution at the disposal of courts that need to preserve their jurisdictional exclusivity. Furthermore, it reinforces the notion of judicial dialogue -sometimes put into question- and goes along the logic of intense cooperation. A logic which exists among public administrations, composite procedures are the best example of it, but lacks among courts.

## **CHAPTER 7**

### **Conclusions**

## I

The subject of composite procedures is still relatively unexplored where much remains to be written. It was advanced in the Introduction that the objective of this dissertation was to assess and make sense of the phenomenon of composite procedures. An academic research work of legal nature entails a conceptualisation of these composite procedures and, once this task is accomplished, the identification of the shortcomings that they bring about and the potential solutions for them. With the idea that nothing is taken for granted, the analysis of composite procedures is only consequential to the clarification of the conceptual *aprioris* of composite procedures, that is, the EU public administration and the administrative procedures of the Union. The conceptualization of the notion of composite procedures and the analysis of the legal shortcomings that they bring about shall be analysed afterwards.

## II

There is a 'public administration' of the Union, but not in the sense that this concept was developed at its origin. The intellectual prerequisite of a public administration is neither to be taken for granted nor irrelevant. Whether or not the administrative bodies of the original European Communities qualified as something different in nature than the autocracy of other big international organisations is difficult to say, but in any case, it has evolved to a fully-fledged public administration with very peculiar characteristics. In the dynamic evolution of the European integration, it is difficult to single out a specific point of time when one can be reassured to state that there is a public administration of the Union, but the Treaty of Lisbon, with its use of the nomenclature 'European administration', would certainly be a good candidate for that.

In the conception of the old designers of the Communities, where Monnet takes a prominent role, one would not need to recur to a newly created European administration, because the few officials of the High Authority, and later, the Commission, would just need to rely on the powerful administrative machineries of the Member States for the implementation of the policies that they set. These few officials have turned into a big organisation, both its central bodies and a variety of agencies and decentralised bodies, whose role is not as restricted as initially conceived.

Today, the reliance on the national administration for the implementation of EU policies has given way to a logic of cooperation that permeates all aspects of the policy making and rule-making process. The starting point consists on the understanding of the profound transformations that have taken place in the change of paradigm from executive federalism to an integrated administrative action. The Court of Justice refers to a “division of powers and competences” as if administrative action of the Union happened like it did in the early Communities. These intellectual constructions depart greatly from the practical reality. In the context of the composite procedures, there should not be no assumption that it is an old division of powers in the sense of executive federalism, but an intense, sometimes blurred, cooperation which needs a clear general legal framework and another rationale of judicial control.

Without this assessment of the reality of the Union's administrative action, all subsequent legal reasoning shall be faulty. On reading the rulings of the EU courts when confronted with the shortcomings with regard to composite procedures, it seems that the Court might (rephrasing an article published by professor Curtin) be resorting to a type of exercise of camouflage which consists, in this case, on reasoning on the basis of a legal fiction; the EU and national administrations issue separate acts and the only question is to allocate a judge and the corresponding procedural rules to the relevant act. Composite procedures do not work with clearly distinguishable contributions from different administrations, and it is not possible to give a proper answer to the legal challenges that the individuals may raise without the minimum common understanding of what is an act, when can it be reviewed, who can challenge it and what court should rule on it.

### III

Once it is established that there is a Union public administration, it is logical to assume that the procedures according to which it operates are administrative procedures. While this assumption is unproblematic for EU administrative procedures implemented directly by Union bodies, when implementation takes place through a composite procedure, the very logic of an administrative procedure is put into question.

Historically, administrative procedures were considered no more than the series of steps to reach a correct and lawful administrative decision. More recently, an individual rights approach is prevalent, and administrative procedures are the guarantees for citizens that the powers of the authorities are exercised in conformity with the Law, and in full respect of the individual rights. This conception is logically shaken when the individual is put *vis-à-vis* not one but two administrations, each governed by a different legal framework.

In the context of the European Union, this approach is particularly salient, and it has been considered by the EU judges as inherent to the right to a good administration. What is more, given the absence of a real legislative codification of administrative procedures in the Union, the Court of Justice has applied, in the three recent cases *Vodafone*, *Schecke* and *Test-Achats*, a strict process review that leaves aside the former emphasis exclusively on substantive outcomes. Given that this prescriptive value of administrative procedures is prevalent, the emphasis on the legality of the procedure and the respect for the procedural guarantees is hard to overstate.

The realisation of this procedural approach to the legality of administrative decisions is also critical for the understanding of the stakes of composite procedures; an individual-rights focus in the context of administrative procedures in the EU is not optional. General



principles such as the rule of law, fundamental rights such as the right to judicial review, so often recalled by the Court of Justice, are in question in this field and cannot be simply ignored due to the complexity of composite procedures. The link between the granting of rights and the provision of remedies is, simply put, insufficient in view of some of the cases examined.

One cannot assume that composite procedures are not administrative procedures and that the guarantees of protections for individuals are different. Quite on the contrary, because they are administrative procedures, the same general principles and individual rights should be applicable to them. Because these guarantees are applicable to composite procedures and the current rules are not satisfactory to that end, special rules should be enacted so that those rights can be effectively enforced.

The conclusion of the initial part of the dissertation is that the Union's public administration is a peculiar one, characterised by intense cooperation with the Member States administrations. The administrative procedures through which it operates are also peculiar, especially when outside the limited fields of direct administration. The logic of cooperation which permeates the nature of the European administration reaches its zenith with composite procedures.

#### IV

Composite procedures were born without the legislator realising that a category different from both direct and indirect administration was being created. They proliferated spontaneously. In technical fields of competence like the common agricultural policy and, more generally, the allocation of European funds, procedural arrangements were created allowing for the intervention of both the Commission's and Member States' public administrations in a single administrative procedure. These procedural arrangements were

relatively instable in time but they proved practical. Like the old French saying goes, *la nécessité fait loi*.

These procedural schemes propagated, particularly in the different fields of authorisation of certain products in the internal market. In those areas where it was necessary to go beyond the rationale of mutual recognition and to establish a EU system of authorisation, composite procedures became predominant. This trend began in the decade of 1990's with the Directives on pesticides, biocides and genetically modified organisms, but has become more intense in recent years.

The explanation for such an expansion of these procedures is twofold. From a technical perspective, these mechanisms enable the administrative bodies of the Union to gather the technical expertise available at the level of the Member States and put it at the service of a common authorisation procedure at the Union level. Needless to say, in fields like the authorisation of medicines or of chemicals, this expertise would otherwise be very difficult to obtain. But perhaps more importantly, from a political perspective, it facilitates that Member States agree to a common authorisation procedure as long as they play a significant role in such procedure. However, precisely because they allow for the expansion of EU competences, they are a positive example of European integration put to work, and they represent an interesting example of the creation of networks of mutual confidence.

Some of the composite procedures explained as examples are indeed clear paradigms of composite procedures. The case of the procedure for the authorisation of pesticides is particularly illuminating, as the main characteristics of composite procedures appear with remarkable clarity. There is a distribution of tasks between the national and the Union level of public administration leading to a final decision taken at the level of the Union. In other types of procedures spelt out, the features are more difficult to perceive. For example, the procedure for the authorisation of chemicals also incorporates the input by national authorities in the sequence for a decision made at the EU level, however, this input is not legally binding for the European authorities, which is an important difference with the

procedure for the approval of pesticides. Despite this element, in practise one cannot see how the input of the national authorities can be less relevant since it entails so detailed technical expertise that the ECHA can only take the conclusions by the national body into full consideration. These two examples provide evidence of how difficult it is to delimit a comprehensive notion of composite procedures and how necessary it is to illustrate the conceptualisation of composite procedures with the most important examples thereof.

## V

Whatever the merits of these new procedures, they trigger a number of challenges, both during the administrative procedure and after it. Specifically, the three areas where the main shortcomings of composite procedures arise have been identified as follows: the right to be heard -during the administrative procedure-, the right to a reasoned decision -at the end of the administrative procedure-, and the right to judicial review -after the administrative procedure-. There might be other rights at stake, but these three are the most important areas. Other rights can be assessed as connected to some of the aforementioned three, like the right to access to one's file in relation to the right to be heard, or the right to a compensation for damages as linked to the right to judicial review. The structure of the central part of the dissertation revolves thus about these rights. This approach is consistent with the evolution observed for administrative procedures more generally, that is, an 'individual rights' approach on the procedure. There is a coherence on the understanding that individual rights are critical in view of the currently prevalent approach of administrative law and thus the relevance of situations - examined at length - in which lacunae can be identified in the context of composite procedures.

Oddly enough, when the Court of Justice began being confronted with the legal shortcomings that composite procedures were bringing about, there was no reflection on a comprehensive approach to these procedures. On the contrary, there was a search for the concrete solution to the specific problem presented by the applicant. This is certainly

justifiable on the grounds that there was not, and there still is not, a general legal framework of composite procedures, but this is an element that must be pointed out.

As it could be expected, the results of this case-by-case approach were diverse. In some cases, the initial reply given by the Union's courts were satisfactory, such as in the case of the repayment of import duties where the Court provided an adequate solution for the shortcoming observed in the context of the right to be heard. In others, like in the access to justice regarding a binding but not final decision of a national authority in the field of the common agricultural policy (the so often cited *Borelli* case), the Court of Justice was unsuccessful in providing for a sufficient response, which put composite procedures - or rather, the complications they entail - under a certain scholarly focus.

Even then, and this is one of the most important claims of this work, both the academia and the judiciary failed to see that there was a general category of procedures from which systemic problems would arise. This has led to the paradox that the answers given by the EU courts to a particular concern related to composite procedures -such as the right to a hearing- was different in the different fields, for example in the area of repayment of import duties against the recovery of structural funds.

In the field of access to justice however, the deficiencies are the most notorious. The structure of composite procedures leads to a situation where the competent judge to review the final decision is not competent to adjudicate on the validity of the whole of the composite procedure, because some of the procedural steps were taken by administrative authorities outside its jurisdiction. The preliminary ruling procedure, though useful in many of the cases examined, is not sufficient and some procedures lead to legal dead-ends that are in breach of individual rights.

The research seeks for completeness in advancing possible solutions for the shortcomings identified. As it usually happens in the context of European Union law, to the question 'what solutions could be envisaged to this problem?' one must add the not less difficult question 'how can these solutions be implemented?'. The first question shall be addressed following the structure of the analysis of the shortcomings, *i. e.* around the right to be heard, the obligation for a reasoned decision and the right to access to justice. The second question shall come in the form, firstly, of the codification of administrative procedures with a specific section for composite procedures, and, secondly and notably regarding the right to access to justice, of a modification of the statute of the Court of Justice to incorporate what we will call an 'inverse preliminary ruling procedure'.

The solution to the first two shortcomings identified is relatively straightforward. Regarding the right to a hearing, in case of composite procedures, it is necessary to guarantee that the individual has an effective right to a hearing at the procedural step where one administration is going to make a discretionary decision which binds the other public administration. This means that more than one hearing can be necessary in the context of a composite procedure. This proposal is far from revolutionary, as it was incorporated in the procedure for repayment of custom duties, for example, following the case law of the Court of Justice<sup>1</sup>, and it is the rule for some of the recently enacted composite procedures like the one for the authorisation of pesticides<sup>2</sup>.

Regarding the obligation to state reasons, the solution would be even simpler. It would consist on a provision reading that, in the context of composite procedures, the competent administrative body shall state the reasons of its decision in a clear, simple and understandable way in each step of the administrative sequence. It would be possible to either have all the reasons stated together with the final decision, or have it referred in part to a

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<sup>1</sup> See Section 5.2.3.

<sup>2</sup> See Section 4.4.2.

statement of reasons provided previously, in accordance with the same standards (the so called statement *per relationem*).

On the substance, then, these proposals are inspired by solutions found in some rulings of the Court of Justice and in pieces of sector-specific European legislation. While agreement on the solutions given to these shortcomings can be relatively easy, the enactment of general provisions in this sense appears to be much more complicated. This is because one would need to create the category of composite procedures in EU legislation before establishing any general rule on them.

The codification of administrative procedures provides for the perfect opportunity for a definition of composite procedures in a general Regulation, and for the enactment of general provisions that will enable to overcoming the breaches in the procedural rights identified.

The prospects of the codification of administrative procedures remain, at this date, uncertain. The European Parliament has formally requested the Commission to submit a proposal to this aim, but the Commission has not shown any political willingness to launch the legislative procedure. This is one more of the domains where the Commission has shown an evident self-restraint, but this is of course the domain of current politics.

From a legal perspective, the proposal would not only be pertinent due to its ability to make composite procedures fully compliant with the rights and guarantees of ordinary administrative procedures, but completely well founded. The legal basis of Article 298 TFEU, so far never used as a legal basis, would not only serve to enact a general codification for administrative procedures of the Union, but for composite procedures as well. The modest approach to the European Parliament in this respect, by not covering composite procedures, is not justified on legal grounds although it might, certainly, be explained in political terms.

Despite its political complexity, it is satisfactory to ascertain that a relatively simple solution for the complexity of composite procedures is possible to envisage and, from a legal perspective, fully viable. The proposals laid down in the work are plausible and complete one of the main aims of this dissertation.

The third problem described, related to the access to justice and the effectiveness of the right to judicial review would need an additional approach. Certainly, a coherent system of reviewability of acts presupposes a common notion of reviewable act and who enjoys legal standing to challenge such acts. A common general framework regarding these issues in the form of a general Act on composite procedures would certainly help to overcome the identified gaps. Although the establishment in legislation of the category of composite procedures would contribute to a more coherent approach also in view of access to justice, general rules for composite procedures would not suffice in this field.

The right to judicial review implies that the competent court must be able to assess the legality of the whole procedure. When part of the procedure was under the responsibility of a different administration the competent judge on the final decision would be unable to extend his judicial competence to that part of the procedure. There is no other way out of this legal deadlock than to offer a mechanism of consultation between courts.

This proposal would need to be treated outside the scope of the codification of administrative procedures, but could be incorporated through an instrument of secondary legislation. Even though this proposal of cooperation between courts can be described, in simple terms, as an inverse preliminary ruling procedure, its objectives are far more limited. It does not aim at any homogeneous interpretation of law, but it only intends to find a specific answer to the question of the validity of the input by national authorities in the context of a procedure ending in an EU decision. Even with this limited objective, the authors who had recently criticised the unidirectional nature of the judicial dialogue taking place today in the

Union by means of the preliminary ruling procedure would probably be happy to see another channel of communication between the national and the Union's judges. Furthermore, it mirrors at the judicial level the logic of intense cooperation existing among public administrations.

Coming back to the idea, stressed in the second chapter, that the conception of the European administration inferred from the Treaties no longer reflects the reality of the administrative cooperation in the EU, the Court of Justice tends to reason in terms of a division of powers which is today rather a legal fiction. By providing the elements for a global consideration of composite procedures, the mechanisms to ensure individual rights along the procedure with the same guarantees as ordinary administrative procedures, and a system of bidirectional judicial dialogue, the shortcomings of composite procedures could be overcome.

## VII

This work demonstrates thus that composite procedures, however complex they are, do not have to entail restrictions of individual rights when the mechanisms advocated are put into place. In this sense, although the dissertation has emphasised the aspects which do not work, legally speaking, in the context of composite procedures, the true objective has been to find a satisfactory solution for them. This work is, in this sense, a defence of composite procedures.

Lawyers and practitioners of EU law are well aware of the complexities of their field. It is known that the simple paradigms valid in national law cannot be applied to the European Union. Any approach of simplification, of transposition of national categories to the rationale of the European Union, is more often than not doomed for failure. When one of the Vice-Presidents of the Convention in charge of drafting the failed European Constitution said "Montesquieu never went to Brussels", he was terribly right. Trying to simplify and go back



to the two separate categories of direct and indirect administration would be a mistake. Composite procedures, as complicated as they are, are a better representation of the reality of the European Union today than the other two forms of administration, and will probably gain even more central role in the future. In a situation where European integration is at risk of stepping back rather than going forward, proposals in the sense of pragmatism and respect for individual rights might be a way ahead without much resistance.

For the academic researcher, the analysis of the pluralism, the multi-level nature of the European Union and the diversity of actors intertwined in the European decision making process appears compelling and stimulating. For the legal practitioner, these situations are complex and challenging; the search for a satisfactory solution is difficult and can only be found on a case-by-case basis. For the citizens immersed in this procedural conundrum, the situation is unjust. The individual is lost and powerless in his quest to have his rights respected. While the plethora of mechanisms of cooperation is inherent to the European Union, the citizen should not suffer from it. The legal framework should be as simplified and as coherent as possible, and the legal protection of the individual should be consistent with the principles and guarantees of the Union, no matter how complex the administrative procedures are.

In combining an academic approach with a practical approach, this work has not lost sight of the need to provide simple, coherent, complete solutions to complex situations, whatever the academic ‘beauty’ of this multi-layered system of EU and national administrative cooperation.

A quote particularly illuminating to end this work is the following: "unitary, constitutionalist models may seem to hold out hope for a more reasoned, more civilised political order beyond the state, but in the non-ideal world of European and global politics

they are likely to backfire. Here, less well-known, more irregular structures may be more appropriate"<sup>3</sup>.

Composite procedures respond clearly to such description, and they are indeed irregular as a legal category, yet appropriate for the current stage of European integration. The aim of this work has been to rationalise them, and provide a system in which the individual will not suffer from their complexity.

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<sup>3</sup> Nico Krisch, "Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space Graduate", 24(4) *Ratio Iuris* (2011), 386-412, at 407.

*(translation into Spanish of Chapter 7)*

## **CAPÍTULO 7**

### **Conclusiones**

## I

La temática de los procedimientos compuestos aún está relativamente inexplorada con aún mucho que escribir sobre el asunto. Ya se avanzó en la introducción que el objetivo de esta tesis era analizar y poner un orden lógico sobre el fenómeno de los procedimientos compuestos. Una investigación académica de esta naturaleza lleva consigo la conceptualización de estos procedimientos compuestos y, una vez hecho esto, la identificación de los defectos que conllevan, así como las potenciales soluciones a los mismos. El propósito ha sido el de no dar nada por sentado y que el análisis de los procedimientos compuestos sea posterior a la clarificación de algunos *aprioris* conceptuales, esto es, la Administración pública de la Unión Europea y los procedimientos administrativos de la Unión.

## II

Existe una 'Administración Pública' de la Unión, pero no en el sentido en que este concepto se desarrolló en su origen. El prerrequisito intelectual de una Administración Pública no es irrelevante ni puede darse por hecho para avanzar después en la investigación. Es difícil afirmar que los órganos administrativos de las antiguas Comunidades Europeas en su origen fueran calificables como algo diferente en su naturaleza jurídica que la burocracia de otras grandes organizaciones internacionales. En cualquier caso, hoy ha evolucionado a una Administración Pública de pleno Derecho si bien con unas características peculiares. En la evolución dinámica de la integración europea, es difícil identificar el momento en el tiempo en que se puede afirmar con seguridad que existe una Administración Pública de la Unión, pero sin duda el Tratado de Lisboa, con su uso de la expresión "Administración Europea", sería un buen candidato para ello.

En la concepción de los antiguos arquitectos de las Comunidades Europeas, entre los que Jean Monnet tiene un papel preponderante, no era necesario recurrir a una Administración europea recién creada, porque a los pocos funcionarios de la Alta Autoridad,

y después, de la Comisión, les bastaría el apoyo de las poderosas maquinarias administrativas de los Estados miembros para la ejecución de las políticas que ellos determinarían. Estos pocos funcionarios se han convertido hoy en una gran organización, tanto en sus órganos centrales como en su variedad de agencias y otros órganos descentralizados, y en las cuales su papel no es tan restringido como inicialmente se concibió.

Hoy en día, la dependencia en las administraciones públicas nacionales para la ejecución de las políticas de la Unión ha dado paso a una lógica de cooperación que permea en todos los aspectos del diseño de las políticas y de la creación normativa. El punto de partida consiste en la comprensión de las profundas transformaciones que han tenido lugar en el cambio de paradigma del federalismo ejecutivo a una acción administrativa integrada e interconectada. El Tribunal de Justicia se refiere a la "división de poderes y competencias" como si la acción administrativa de la Unión funcionara como en las antiguas Comunidades. Estas construcciones intelectuales clásicas se apartan en gran medida de la realidad práctica. En relación a los procedimientos compuestos, no debería partirse de la existencia de una vieja división de poderes en el sentido del federalismo ejecutivo, sino una cooperación intensa, a veces confusa, que necesita de un marco jurídico general y una lógica de control judicial distinta a la tradicional.

Sin el análisis de esta realidad de la actividad administrativa en la Unión, todo razonamiento jurídico subsiguiente sería defectuoso. De la lectura de las sentencias de los tribunales de la Unión cuando se confrontan a los problemas derivados de los procedimientos compuestos, parece que los jueces estuvieran (retomando la expresión de un artículo de la profesora Curtin) recurriendo a un ejercicio de camuflaje que consistiría, en este caso, en razonar sobre la base de una ficción jurídica. Esta ficción sería que la UE y las administraciones nacionales emiten distintos actos administrativos y la única cuestión sería determinar el juez competente y las normas procesales aplicables al acto administrativo. Los procedimientos compuestos no operan con contribuciones claramente distinguibles de distintas administraciones públicas, y no es siempre posible dar una respuesta jurídica adecuada a los recursos jurídicos elevados por los particulares sin una mínima comprensión

común de lo que es un acto administrativo, cuando puede ser objeto de revisión, quién puede impugnarlo y cuál es el tribunal competente.

### III

Una vez aclarado que existe una Administración Pública de la UE, es lógico suponer que los procedimientos de acuerdo con los cuales actúa son procedimientos administrativos. Aunque esta suposición no es problemática para los procedimientos administrativos de la Unión implementados directamente por los órganos de la Unión, cuando la implementación se lleva a cabo a través de un procedimiento compuesto, la base más esencial de la lógica del procedimiento administrativo se pone seriamente en cuestión.

Desde una perspectiva histórica, los procedimientos administrativos han sido considerados como una secuencia de trámites para llegar a un acto administrativo correcto y jurídicamente válido. Hoy en día, prevalece un enfoque centrado en los derechos subjetivos, de forma que los procedimientos administrativos son las garantías para los ciudadanos de que los poderes de las autoridades públicas son ejercitados de acuerdo a Derecho, y en pleno respeto a los derechos individuales. Esta concepción quiebra en el momento en que el ciudadano se ve enfrentado no a una sino a varias Administraciones Públicas, cada una de las cuales estaría sometida a un distinto marco jurídico.

En el ámbito de la Unión Europea, este enfoque con énfasis en los derechos subjetivos es particularmente destacada y ha sido considerada por los jueces de la Unión como inherente al derecho a la buena administración. A mayor abundamiento, dada la ausencia de una verdadera codificación de los procedimientos administrativos, el Tribunal de Justicia ha aplicado una revisión procesal estricta en tres casos recientes (Vodafone, Schecke y Test-Achats), con una aproximación que deja de lado el antiguo énfasis solamente en los resultados substantivos. Teniendo en cuenta por tanto que este valor prescriptivo del procedimiento administrativo es prevalente, es difícil de sobreestimar la centralidad del énfasis en la legalidad del procedimiento y en el respeto a las garantías procesales.

Este enfoque procesal de la legalidad de los actos administrativos tiene también una importancia crítica para la comprensión de los retos relativos a los procedimientos compuestos; el énfasis en los derechos individuales en relación a los procedimientos compuestos no es meramente opcional. Principios generales tales como el Estado de Derecho, derechos fundamentales tales como el derecho a la tutela judicial efectiva, tantas veces invocados por el Tribunal de Justicia, se ponen en duda en este ámbito y no pueden ser ignorados simplemente debido a la complejidad de los procedimientos compuestos. El vínculo entre el otorgamiento de derechos y el ofrecimiento de remedios resulta, simplemente, insuficiente a la vista de algunos de los casos examinados.

No se puede admitir que los procedimientos compuestos no sean procedimientos administrativos o que las garantías de la protección de los particulares sean distintas. Más bien al contrario, dado que los procedimientos compuestos son procedimientos administrativos, les son aplicables a ellos los mismos principios generales y derechos subjetivos. Precisamente porque dichas garantías son aplicables a los procedimientos compuestos y las normas actuales no son satisfactorias, deben adoptarse normas específicas para que esos derechos puedan ser ejercitados de forma efectiva.

La conclusión de esta parte inicial de la tesis es que la Administración Pública de la Unión Europea es peculiar y está caracterizada por una intensa cooperación con las administraciones de los Estados miembros. Los procedimientos administrativos a través de los cuales opera son también peculiares, especialmente si uno se encuentra fuera de los ámbitos limitados de la administración directa. La lógica de la cooperación que permea la naturaleza de la Administración Pública europea alcanza su punto álgido con los procedimientos compuestos.

#### IV

El nacimiento de los procedimientos compuestos se produjo sin que el legislador se diera cuenta de que, al crearlos, estaba dando lugar a una categoría de procedimientos distinta tanto de la administración directa como de la indirecta. Inicialmente, los procedimientos compuestos han proliferado de forma espontánea. En ámbitos técnicos de competencia de la

Unión, tales como la política agrícola común y, en general, la distribución de fondos europeos, se crearon esquemas procedimentales que permitían la intervención tanto de la Comisión como de la administración de los Estados miembros en un procedimiento administrativo único. Estos esquemas procedimentales eran relativamente inestables en el tiempo pero demostraron su eficacia práctica. Como dice la vieja cita en francés, *la nécessité fait loi*.

Estos esquemas procesales se propagaron, en particular a los distintos ámbitos de autorización de ciertos productos en el mercado interior. Los procedimientos compuestos han ido haciéndose predominantes en aquellas áreas en que se averó necesario ir más allá de la lógica del reconocimiento mutuo para establecer un sistema comunitario de autorización central. Esta tendencia comenzó en la década de 1990 con las directivas sobre pesticidas, biocidas y organismos modificados genéticamente si bien recientemente se ha hecho más intensa.

La explicación para la expansión de estos procedimientos atiende a dos motivos. Desde un punto de vista técnico, estos mecanismos permiten a los órganos administrativos de la Unión reunir el conocimiento técnico disponible al nivel de los Estados miembros y ponerlo al servicio de un procedimiento común de autorización a nivel de la Unión. Huelga decir que en materias tales como la autorización de medicamentos o de productos químicos, este conocimiento técnico es muy difícil de obtener de otra manera. Pero quizá de forma más importante, desde un punto de vista político, estos procedimientos facilitan que los Estados miembros den su consentimiento a procedimientos comunes de autorización en tanto en cuanto ellos mantengan un papel significativo en dicho procedimiento. Sin embargo, precisamente porque permiten la expansión de las competencias de la Unión Europea, son un ejemplo positivo de integración europea en funcionamiento, y representan un paradigma interesante de creación de redes de confianza mutua.

Algunos de los procedimientos compuestos explicados como ejemplos son de hecho bastante ilustrativos. El caso del procedimiento para la autorización de pesticidas es



particularmente representativo, ya que las principales características de los procedimientos compuestos aparecen con claridad meridiana. Existe una distribución de tareas entre los niveles nacional y europeo de administración pública que lleva finalmente a un acto administrativo adoptado por la Unión. En otros de los procedimientos examinados, los rasgos de los procedimientos compuestos son más difíciles de observar. Por ejemplo, el procedimiento para la autorización de productos químicos también incorpora una contribución por parte de las autoridades nacionales dentro de la secuencia para llegar a una decisión tomada a nivel de la Unión Europea, sin embargo esta contribución no es jurídicamente vinculante para las autoridades de la Unión, lo que supone una diferencia importante con el procedimiento para la aprobación de los pesticidas. A pesar de este elemento, en la práctica, es difícil mantener que la contribución de las autoridades nacionales pueda ser menos relevante, dado que entraña un conocimiento técnico tan detallado que la Agencia Europea de Productos Químicos no pueden sino atender a las conclusiones de la contribución nacional. Estos dos ejemplos dan una clara muestra de hasta qué punto no se puede entender los procedimientos compuestos en general sin observar los ejemplos concretos más importantes de los mismos.

## V

Cualesquiera que sean numerosas ventajas de los procedimientos compuestos, lo cierto es que dan lugar a una serie de deficiencias jurídicas tanto durante el propio procedimiento administrativo como después de él. Específicamente, las tres áreas donde surgen las deficiencias de los procedimientos compuestos se han identificado de la siguiente forma: el derecho a ser oído -durante el procedimiento administrativo-, la obligación de motivar los actos administrativos -al finalizar el procedimiento administrativo-, y el derecho a la tutela judicial efectiva -después del procedimiento administrativo-. Podrían existir otros derechos subjetivos afectados, pero estas tres son las áreas más importantes. Otros derechos podrían evaluarse como conexos a alguno de los otros tres, como el derecho de acceso al expediente administrativo en relación con el derecho a ser oído, o el derecho a exigir una responsabilidad patrimonial de la Administración, como ligado al derecho a la tutela judicial. La estructura de la parte central de la tesis gira en torno a estos tres derechos. Este enfoque es coherente con la evolución observada para los procedimientos administrativos en general, esto es, una aproximación con énfasis en los derechos individuales. Hay por tanto una coherencia entre la comprensión de que los derechos subjetivos tienen una importancia crítica

a la vista de esta concepción prevalente en el Derecho Administrativo, y de ahí la relevancia de las situaciones, explicadas con exhaustividad, en las que se pueden encontrar lagunas jurídicas generadas por los procedimientos compuestos.

Curiosamente, cuando el Tribunal de Justicia empezó a confrontarse con las dificultades relativas a los procedimientos compuestos, no hubo nunca una reflexión pausada sobre una aproximación omnicomprendensiva hacia dichos procedimientos. Por el contrario, lo que hubo fue una búsqueda de la solución concreta para el problema concreto que concernía al demandante. Ello parece justificable en atención a que no había, y sigue sin haber, un marco jurídico general para los procedimientos compuestos, pero no puede por ello dejar de ser puesto de manifiesto.

Cómo podría esperarse, los resultados de este enfoque casuístico han sido variados. En algunos casos, la respuesta inicial dada por los tribunales de la Unión ha sido satisfactoria, como en el caso de las devoluciones de los tributos a la importación en el que el Tribunal de Justicia proporcionó una solución adecuada para la deficiencia identificada en el ámbito del derecho a ser oído. En otros casos, como en los de acceso a la jurisdicción en relación con una decisión, jurídicamente vinculante pero no final, por parte de una autoridad administrativa nacional (el tan citado caso *Borelli*), el Tribunal de Justicia no logró dar una respuesta suficiente, lo cual puso a los procedimientos compuestos, o más bien las complicaciones que llevan consigo, bajo un cierto foco doctrinal.

Pero incluso en este caso, y esta es una de las principales reivindicaciones de esta investigación, ni la doctrina ni la judicatura lograron identificar una categoría especial de procedimientos de la cual surgirían problemas sistémicos. Esto ha llevado a la paradoja de que las respuestas dadas por los jueces de la Unión a un problema concreto, como el derecho de audiencia, han sido distintas en diferentes ámbitos, por ejemplo en el área de la devolución de los tributos de la importación frente a la recuperación de fondos estructurales.

Es en el ámbito del derecho a la tutela judicial, sin embargo, donde las deficiencias son más notorias. La estructura de los procedimientos compuestos lleva a situaciones en las que el juez competente para decidir sobre el acto que pone fin a la vía administrativa no es competente para juzgar la validez de la integridad del procedimiento administrativo, porque alguno de los actos intermedios han sido adoptados por órganos administrativos fuera de su jurisdicción. El procedimiento prejudicial, aunque útil en muchos de los casos examinados, no es suficiente y en algunos de los procedimientos se llega a situaciones jurídicamente imposibles de resolver en contravención de los derechos de los particulares.

## VI

Esta investigación tiene ánimo de ser completa en relación a las soluciones propuestas para las deficiencias identificadas. Como ocurre a menudo en el ámbito del Derecho de la Unión Europea, a la pregunta ¿qué soluciones pueden ser planteadas para este problema? Se debe añadir la pregunta no menos difícil de ¿cómo se pueden llevar a la práctica dichas soluciones? La primera pregunta debe ser afrontada siguiendo la estructura del análisis de las deficiencias, esto es, en torno al derecho de audiencia, la obligación de motivación y el derecho al recurso judicial. La segunda pregunta debe considerarse, primero, dentro del marco de la codificación general de los procedimientos administrativos y, segundo, particularmente respecto al derecho a la tutela judicial, dentro del marco de una modificación del Estatuto del Tribunal de Justicia que incorpore lo que llamaremos un "procedimiento de cuestión prejudicial inversa".

La solución a las dos primeras deficiencias identificadas es relativamente sencilla. En lo que se refiere al derecho a ser oído, en caso de que nos hallemos en un procedimiento compuesto, sería necesario garantizar que el individuo tiene un derecho efectivo a la audiencia en cada trámite procesal en que un nivel de administración va a tomar una decisión discrecional que vaya a ser vinculante para otro nivel de administración. Esto quiere decir que puede ser necesaria más de una audiencia en el marco de un procedimiento compuesto. Esta propuesta no es en modo alguno revolucionaria, sino que se inspira en el procedimiento para la devolución de los tributos a la importación siguiendo las indicaciones de la

jurisprudencia del Tribunal de Justicia<sup>1</sup>, por ejemplo, o en algunos de los procedimientos compuestos adoptados recientemente como el de la autorización de pesticidas<sup>2</sup>.

En lo que se refiere a la obligación de motivar los actos administrativos, la solución sería incluso más simple. Consistiría en una norma estableciendo que, en caso de que nos hallemos frente a un procedimiento compuesto, el órgano administrativo competente debería motivar de forma clara, simple y comprensible cada una de las decisiones, si son varias, que han integrado la secuencia administrativa. Sería posible tanto incluir una motivación completa en el acto que pone fin a la vía administrativa, como referirse en este acto administrativo final a una motivación anterior referida a un acto intermedio, siempre que esta última cumpla las mismas garantías (en este último caso, se trataría de la llamada motivación *per relationem*).

En lo sustancial, por tanto, estas propuestas se inspiran en las soluciones que se han encontrado en algunas de las decisiones del Tribunal de Justicia y en algunas legislaciones sectoriales. Aunque no haya problemas en aceptar estas soluciones, lo cierto es que incorporarlas como normas generales puede resultar mucho más complejo. Esto es así porque, como puede entenderse fácilmente, sería necesario crear por ley la categoría de procedimiento compuesto antes de establecer cualquier regulación sobre los mismos.

La codificación de los procedimientos administrativos ofrece la oportunidad perfecta para una definición normativa de los procedimientos compuestos incorporada a un Reglamento de carácter general, así como para la adopción de las normas generales que permitan superar las violaciones de derechos procesales que se han identificado.

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<sup>1</sup> Vid. Sección 5.2.3.

<sup>2</sup> Vid. Sección 4.4.2.

La viabilidad de una codificación de los procedimientos administrativos permanece, aún hoy, incierta. El Parlamento europeo ha solicitado formalmente a la Comisión que remita una iniciativa legislativa en este sentido, si bien la Comisión no ha mostrado hasta la fecha una voluntad política clara de iniciar el procedimiento legislativo. Este es uno de los ámbitos donde la Comisión ha mostrado una evidente autocontención, si bien ello es naturalmente un terreno puramente político.

Desde un punto de vista jurídico, la propuesta que se plantea en este trabajo no solo es pertinente, dada su idoneidad para hacer que los procedimientos compuestos sean plenamente respetuosos de los derechos y garantías propios a todo procedimiento administrativo, sino que además sería bien fundada en Derecho. La base jurídica del artículo 298 del Tratado de Funcionamiento de la Unión Europea, nunca utilizada para legislar hasta la fecha, no solamente serviría para aprobar una codificación general de los procedimientos administrativos, sino también para los procedimientos compuestos. El enfoque restringido del Parlamento europeo en este respecto, que opta por no abarcar los procedimientos compuestos, no se justifica sobre la base de fundamentos jurídicos, aunque podría entenderse por razones políticas.

A pesar de la dificultad política, resulta satisfactorio para el investigador afirmar que una solución relativamente simple para la complejidad de los procedimientos compuestos sería concebible y, desde un punto de vista jurídico, enteramente viable. Las soluciones propuestas en esta investigación serían plausibles y completas, una de las finalidades principales de esta tesis.

El tercer problema descrito, relativo al acceso a la justicia y a la efectividad del derecho a la tutela judicial efectiva requeriría de un enfoque adicional. Sin duda, un sistema coherente de revisión judicial de actos administrativos presupone una noción común de acto impugnado y de legitimación activa. Un marco jurídico general sobre estos aspectos ayudaría a superar algunas de las lagunas identificadas. Aunque el establecimiento por vía de la legislación de una categoría de procedimiento compuesto contribuiría a una aproximación

más coherente también respecto al acceso a la justicia, normas generales sobre procedimientos compuestos no serían suficientes en este ámbito.

El derecho a la tutela judicial efectiva implica también que el tribunal competente pueda revisar la legalidad de la totalidad del procedimiento. Cuando una parte del procedimiento está bajo la responsabilidad de una Administración diferente, el juez competente respecto del acto que pone fin a la vía administrativa no podría extender su competencia a aquella parte del procedimiento administrativo. No hay otra vía de escape para este ‘punto muerto’ que ofrecer un mecanismo de consultas entre tribunales.

Esta propuesta necesitaría ser tratada fuera del ámbito de la codificación de los procedimientos administrativos, pero podría ser incorporada con un instrumento de Derecho derivado. Aunque este procedimiento de cooperación entre tribunales podría ser descrito, en términos simples, como un procedimiento de cuestión prejudicial inversa, sus objetivos serían mucho más limitados. Este instrumento no pretende una interpretación homogénea del Derecho, sino que solo pretende encontrar una respuesta específica a la cuestión de la validez de una contribución por parte de las autoridades nacionales en el marco de un procedimiento que acaba con un acto administrativo de la Unión Europea. Aún con este objetivo tan limitado, los autores que recientemente han vertido una crítica sobre la naturaleza unidireccional del diálogo judicial que tiene lugar actualmente en la Unión por medio del procedimiento de la cuestión prejudicial verían probablemente con satisfacción otra vía de comunicación entre los jueces de la Unión y los jueces nacionales. Además, es un instrumento que reflejaría a nivel judicial la estructura de intensa cooperación que ya existe a nivel administrativo.

Volviendo a la idea, destacada en el capítulo segundo, de que la concepción de la Administración europea derivada de los Tratados ya no refleja la realidad de la cooperación administrativa en la Unión Europea, el Tribunal de Justicia tiende a razonar en términos de división de poderes, lo cual es hoy en día más bien una ficción jurídica. Proporcionando los elementos para una consideración global de los procedimientos compuestos, los mecanismos para asegurar los derechos individuales a lo largo del procedimiento con las mismas garantías

que los procedimientos administrativos ordinarios, y un sistema bidireccional de diálogo judicial, las deficiencias de los procedimientos compuestos podrían ser superadas.

## VII

Este trabajo demuestra que los procedimientos compuestos, a pesar de su complejidad, no tienen necesariamente que llevar consigo restricciones de derechos individuales siempre que los mecanismos defendidos como soluciones se pongan en marcha. En definitiva, aunque la tesis ha puesto énfasis en los aspectos que no funcionan de los procedimientos compuestos, el verdadero objetivo ha sido encontrar una solución satisfactoria para ellos. Este trabajo es, en este sentido, una defensa de los procedimientos compuestos.

Los juristas y los funcionarios encargados de aplicar el Derecho de la Unión Europea están muy al corriente de las complejidades de este campo. Es sabido que los paradigmas sencillos del Derecho nacional no pueden ser aplicados sin más a la Unión Europea. Cualquier enfoque de simplificación o de mera transposición de las categorías del Derecho interno al esquema lógico de la Unión Europea estén condenadas al fracaso en la mayoría de las ocasiones. Cuando un de los vicepresidentes de la Convención encargada de la frustrada Constitución europea dijo que “Montesquieu nunca vino a Bruselas” estaba definitivamente en lo cierto. El intento de simplificar y volver a las dos categorías separadas de Administración directa e indirecta sería vano. Los procedimientos compuestos, aunque resulten complicados, son una representación de la realidad actual de la Unión Europea mucho mejor que las otras dos formas de Administración, y probablemente ganará un peso aún mayor en el futuro. En una situación como la actual en la que la integración europea está gravemente en riesgo de dar un paso atrás más que de dar un paso hacia delante, las propuestas que van en el sentido de un cierto pragmatismo y respeto a los derechos individuales podrían tener una cierta viabilidad.

Para el académico, el análisis del pluralismo, de la naturaleza multinivel de la Unión Europea y la interacción de los distintos actores intercalados en el proceso decisorio europeo resulta inspirador y estimulante. Para el jurista con enfoque práctico, estas situaciones con

complejas y llenas de desafíos, la búsqueda de una solución satisfactoria es difícil y debe intentarse de forma casuística. Para el ciudadano que se encuentra inmerso en este galimatías procesal, la situación es, simplemente, injusta. El particular se ve perdido e impotente en su batalla para que sus derechos sean respetados. El ciudadano no debería sufrir el perjuicio del gran abanico de mecanismos de cooperación inherente a la Unión Europea. El marco jurídico debería ser tan simplificado y tan coherente como sea posible, y la protección jurídica del particular debería ser consistente con los derechos y garantías de la Unión, cualquiera que sea la complejidad de los procedimientos administrativos.

Combinando un enfoque académico y un enfoque práctico, este trabajo no ha perdido de vista la necesidad de ofrecer soluciones, simples, coherentes y completas a las situaciones complejas examinadas, cualquiera que sea la belleza intelectual de este sistema multinivel de cooperación administrativa entre la Unión Europea y los Estados miembros.

Una cita particularmente reveladora para finalizar este trabajo sería la siguiente: "puede parecer que los modelos constitucionales unitarios dar lugar a una esperanza de un orden político más allá del Estado que resulte más razonado y más civilizado, pero en el mundo no ideal de la política europea y global lo más probable es que tengan el efecto contrario. Aquí, estructuras menos conocidas, más irregulares pueden ser más apropiadas"<sup>3</sup>.

Los procedimientos compuestos responden claramente a aquella descripción, y de hecho son irregulares como categoría, aunque apropiados para la fase actual de la integración europea. El propósito de este trabajo ha sido racionalizarlos y ofrecer un sistema en el que el ciudadano no sufra perjuicio a causa de su complejidad.

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<sup>3</sup> Nico Krisch, "Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space Graduate", 24(4) *Ratio Iuris* (2011), 386-412, p. 407.



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- Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (OJ 2007 L 299, 1-149)
- "Explanations relating to the Charter of Fundamental Rights", provided by the praesidium of the Convention that drew up the Charter. (OJ 2007 C 303. 17-35).
- Regulation (EC) No 1394/2007 of the European Parliament and of the Council of 13 November 2007 (OJ 2007 L 324, 121)
- Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (consolidated version) (OJ 2008 L 24, 8-29).
- Directive of the European Parliament and of the Council 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002, L108, 33-50).
- Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) (OJ 2008 L 76 , 28-30)
- Council Regulation (EC) No 717/2008 of 17 July 2008 establishing a Community procedure for administering quantitative quotas (OJ 2008 L 198, 1–7)
- Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ 2008 L 348, 130–134).
- Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 87, 109)
- Regulation (EC) No 470/2009 of the European Parliament and of the Council of 6 May 2009 (OJ 2009 L 152, 11)
- Council Decision 2009/371/JHA of 6 April 2009, establishing the European Police Office (OJ 2009 L 121, 37).
- Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, 1-47).
- Regulation (EU) No 1235/2010 of the European Parliament and of the Council of 15 December 2010 (OJ 2006 L 348, 1)

- Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ 27 L 2010, 1-17).
- Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, 13-18).
- Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (OJ 2011 L 65, 1-22)
- Regulation (EU) No. 528/2012 of the European Parliament and of the Council concerning the making available on the market and use of biocidal products (OJ 2012 L 167, 1-123).
- Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, 1-96)
- Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, 1-29)
- Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, 1-30).
- Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, 31-59).
- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, 60-95).
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 80, 96-116).
- Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions

on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, 320–469).

### ***Council of Europe***

- Recommendation (80)2 concerning the Exercise of discretionary Powers by administrative Authorities Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies.
- Recommendation (87)16 on administrative procedures affecting a large number of persons Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies.
- Recommendation (91)1 on administrative sanctions Adopted by the Committee of Ministers on 13 February 1991 at the 452nd meeting of the Ministers' Deputies.

### ***Internaitonal agreements***

- Paris Convention for the Protection of Industrial Property of 1883 awarded special protection for indications of sources and appellations of origin .
- Madrid Agreement on the Indications of Source of 1891 and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958.
- Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed at Washington, D.C., on 3 March 1973 and amended at Bonn, on 22 June 1979.
- United Nations Security Council Resolution 1373 (2001) of 28 September 2001
- Security Council passed Resolution 1390 (2002), on the situation in Afghanistan of 16 January 2002

## *National legislations*

### Austria

- Allgemeines Verwaltungsverfahrensgesetz, BGBl. Nr. 51/1991 published in the Bundesgesetzblatt für die Republik Österreich of 31 January 1991.

### Croatia

- General Administrative Procedures Act, of 27 March 2009, published in the Official Gazette no. 47 of 16 April 2009.

### France

- Act of 16-24 August 1790 on the separation of the administrative and judicial authorities
- Act on the non-contentious administrative procedure of 1 December 1978, published in Mémorial A n° 87 of 27 December 1978.
- Act on the improvement of relations between the administration and the public n° 78-753 (JORF of 18 July 1978 page 2851).
- Act on the motivation of administrative decisions n° 79-587 (JORF of 12 July 1979 page 1711).
- Act on the rights of the citizens in their relations with the administrations n° 2000-321 (JORF n°88 of 13 April 2000 page 5646).
- Act on the control of the use and release of genetically modified organisms n° 92-654 (JORF n° 163 of 16 July 1992).

### Germany

- Federal Nature Protection Act (Bundesnaturschutzgesetz of 12 March 1987) Bundesgesetzblatt 1987 I, 889
- German Administrative Procedure Act (Verwaltungsverfahrensgesetz of 25 May 1976) Bundesgesetzblatt 1976.
- Code of Administrative Court Procedure of 19 March 1991 (Verwaltungsgerichtsordnung), Bundesgesetzblatt 1991 I, 686
- Federal Building Code (Bekanntmachung der Neufassung des Baugesetzbuchs of 27 August 1997) Bundesgesetzblatt 1997 I, 2141

### Ireland

- Freedom of information Act, of 21 April 1997, number 13 of 1997.

### Italy

- Act of 7 august 1990 on administrative procedure and access to documents (n. 241 Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi. GU n.192).

#### Netherlands

- General Administrative Law Act of 4 June 1994, (Algemene wet bestuursrecht).

#### Poland

- Code of Administrative Procedure (Kodeks postępowania administracyjnego) of 14 June 1960, Journal of Laws 1960 No. 30, item 168.

#### Spain

- Act requesting ministries to adopt an administrative procedure for their respective departments (Ley de 19 de octubre de 1889 disponiendo que por cada Ministerio se haga y publique un reglamento de procedimiento administrativo para las dependencias centrales, provinciales y locales del mismo); published in Gaceta de Madrid nº 298 of 25 October 1889.
- Act on administrative procedure of 17 July 1958 (BOE of 18 July 1958).
- Act 30/1992 on the legal framework of the Public Administrations and on a common administrative procedures of 26 November 1992 (Ley 30/1992, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común; BOE 285 of 27 November 1992).
- Act 50/1997, of 27 November, on the Government (BOE of 28 November 1997).
- Act 29/1998 on the Contentious-Administrative Jurisdiction of 13 July 1998 (Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa) (BOE of 14 July 1998).

#### United Kingdom

- Tribunals and Enquiries Act of 1 August 1958.
- Civil Procedure Rules of 10 December 1998 (SI 1998/3132).
- Human Rights Act of 9 November 1998 (c. 42).
- Freedom of Information Act of 30 November 2000 (c.36).
- Equality Act of 8 April 2010

#### United States

- Administrative Procedure Act, Pubic Law 79–404, 60 Stat. 237, enacted 11 June 1946.

